80 108-376

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 235.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY OF WILLIAM H. LOCKE, PLAINTIFF IN ERROR,

vs.

WILLIAM KING, JOHN M. GOETCHIUS, AND EDWARD E. POOR, ASSIGNEES OF THE PROPERTY AND EFFECTS OF WILLIAM H. LOCKE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 3, 1880.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of New York, for the first judicial department, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas Boese, as receiver of the property of William H. Locke, plaintiff, and William King, John M. Goetchius, and Edward E. Poor, assignees of the property and effects of William H. Locke, impleaded with William H. Locke, wherein is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege, or immunity is claimed

2 under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, and wherein a manifest error hath happened to the great damage of the said plaintiff, as is said and as appears by his complaint and the said judgment: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and pleadings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid, on the second Monday of October, 1880, that the record and proceedings aforesaid being inspected, the said justices of the

3 Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, ought to be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 10th day of April, A. D. 1880, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

Allowed by—

NOAH DAVIS,
Presiding Justice of the Supreme Court of the State of New York, of the First Judicial Department.

(Indorsed:) Supreme Court of the United States. Thomas Boese, as receiver, &c., plaintiff in error, vs. William King & o'rs, assignees, &c., defendants in error. Writ of error. C. Bainbridge Smith, att'y for pl'ff in error. Filed Ap'l 16, 1880.

4 The answer of the justices of the supreme court of the State of New York, in and for the first judicial department.

The record and proceedings aforesaid, together with all other thing touching or in any wise concerning the same.

We certify, under the seal of our said court, to the justices of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Dated New York, June 22nd, 1880.

By the court:

[SEAL.] WILLIAM A. BUTLER, *Clerk.*

5 Know all men by these presents, that we, Wilhelm Pickhardt, of the city of New York, and Wilhelm F. Hauff, of the same place, in the State of New York, are held and firmly bound unto William King, John M. Goetchius, and Edward E. Poor, assignees of the property and effects of William H. Locke, in the full and just sum of one thousand five hundred dollars, lawful money of the United States, to be paid to the said William King, John M. Goetchius, and Edward E. Poor, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twelfth day of April, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately in the supreme court of the State of New York, in a suit depending in said court between Thomas Boese, as receiver of the property of William H. Locke and William King, John M. Goetchius, and Edward E. Poor, assignees of the property and effects of William H. Locke, judgment was rendered against the said Thomas Boese,

6 as receiver of the property of William H. Locke, and the said Thomas Boese, as receiver of the property of William H. Locke, having obained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to be sent to the said William King, John M. Goetchius, and Edward E. Poor, assignees as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of this obligation is such that if the said Thomas Boese, as receiver of the property of William H. Locke, shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

WM. PICKHARDT. [L. S.]
WM. F. HAUFF. [L. S.]

Sealed and delivered in the presence of—
BENJAMIN YATES.

7 CITY AND COUNTY OF NEW YORK, *ss:*

Wilhelm Pickhardt, being duly sworn, says that he is one of the obligors on the foregoing bond; that he is a resident and freeholder in the State of New York, and worth the sum of one thousand five hundred dol-

lars over and above all the debts and liabilities which he owes or has incurred, exclusive of property exempt from levy and sale under an execution.

WM. PICKHARDT.

Sworn to before me this 12th day of April, 1880.

BENJAMIN YATES,
Notary Public (7), *New York County.*

CITY AND COUNTY OF NEW YORK, *ss:*

Wilhelm F. Hauff, being duly sworn, says that he is one of the obligors in the foregoing bond; that he is a resident and freeholder in the State of New York, and worth the sum of one thousand five hundred dollars over and above all the debts and liabilities which he owes or has incurred, exclusive of property exempt from levy and sale under an execution.

WM. F. HAUFF.

Sworn to before me this 12th day of April, 1880.

8 BENJAMIN YATES,
Notary Public (7), *New York County.*

STATE OF NEW YORK,
City and County of New York, ss:

On this 12th day of April, 1880, personally appeared before me Wilhelm Pickhardt and Wilhelm T. Hauff, to me known to be the individuals described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

[L. S.] BENJAMIN YATES,
Notary Public, New York County.

9 (Indorsed:) Supreme court. Thomas Boese, as receiver, &c., vs. William King & o'rs, assignees. Bond on writ of error. C. Bainbridge Smith, att'y for pl'ff.

I approve of the form of the within bond and of the sufficiency of the sureties therein.

N. Y., April 15, 1880.

NOAH DAVIS,
Pres. Justice.

10 The United States of America to William King, John M. Goetchius, and Edward E. Poor, assignees of the property and effects of William H. Locke:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the city and county of New York, wherein Thomas Boese, as receiver of the property of William H. Locke, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Hon. Noah Davis, presiding justice of the supreme court, State of New York, first judicial department, the fifteenth day of April, in the year of our Lord one thousand eight hundred and eighty.

NOAH DAVIS,
P. Justice.

11 (Indorsed:) Supreme Court of the United States. Thomas Boese, as receiver, &c., plaintiff in error, vs. William King & o'rs, assignees, &c., defendants in error. Citation. C. Bainbridge Smith, att'y for pl'ff in error.

We hereby admit service of within citation.
N. Y., April 16, 1880.

MARTIN & SMITH,
Att'ys for Def'ts.

Filed June 12th, 1880.

12 Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in court of appeals held at the capitol in the city of Albany on the 11th day of November, in the year of our Lord one thousand eight hundred and seventy-nine before the judges of said court.

Witness the Hon. Sandford E. Church, chief judge presiding.

E. O. PERRIN, *Clerk.*

Remittitur.—March 24, 1880.

THOMAS BOESE, RECEIVER, &c., RESPONDENT,
vs.
WILLIAM KING & O'RS, ASSIGNEES, &c., IMPL'ED, appellants.
} D. 3.

Be it remembered that on the 26th day of April, in the year of our Lord one thousand eight hundred and seventy-nine, William King & o'rs, assignees, &c., the appellants in this action came here into the court of appeals by Martin & Smith, their attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York, and Thomas Boese, receiver, &c., the respondent in said action afterwards appeared in
13 said court of appeals by C. Bainbridge Smith, his attorney.

Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. M. W. Divine, of counsel for the appellants, and by Mr. C. Bainbridge Smith, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the supreme court be, and the same hereby is, reversed, and judgment rendered for the defendants with costs.

And it was also further ordered that the record aforesaid and the proceedings in the court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be reversed as aforesaid.

And hereupon as well as the notice of appeal and return thereto aforesaid, as the judgment of the court of appeals aforesaid by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,

14 *Clerk of the Court of Appeals of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 24, 1880:

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals originally filed therein, attached thereto. D. 3.

[L. S.] E. O. PERRIN, *Clerk.*

15 Supreme Court.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius and Edward E. Poor, as assignees of the property and effects of the said William H. Locke.

Please take notice, that the defendants, William King, John M. Goetchius, and Edward E. Poor, as assignees of the property and effects of William H. Locke, hereby appeal to the general term of this court, from the judgment entered in this action against said defendants, on the 4th day of June, 1877, and from each and every part of the said judgment.

Dated New York, June 7th, 1877.

MARTIN & SMITH,
Att'ys for said Defendants.

To C. BAINBRIDGE SMITH, Esq.,
Plaintiff's Attorney.
To HENRY A. GUMBLETON, Esq.,
Clerk of the City and County of New York.

16 *Summons for relief.*

Supreme court, city and county of New York.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke, plaintiff,
against
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius and Edward E. Poor, as assignees of the property and effects of William H. Locke, defendants. (Com. not ser.)

To the defendants above named:

You are hereby summoned and required to answer the complaint in this

action, which will be filed in the office of the clerk of the city and county of New York, at the county court-house in the city of New York, and to serve a copy of your answer to the said complaint, on the subscriber, at his office, No. 145 Broadway, in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated New York, June 9th, 1876.

C. BAINBRIDGE SMITH,
Plaintiff's Attorney.

17 Supreme court, city and county of New York.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius, and Edward E. Poor, assignees of said Locke.

The complaint of Thomas Boese, as receiver of the property of the said William H. Locke, on information and belief, shows to this court:

I. That on the third day of February, in the year one thousand eight hundred and seventy-six, Wilhelm Pickhardt and Adolf Kuttroff recovered judgment in the Supreme Court, at the city and county of New York, against the said William H. Locke for the sum of three thousand and eighty-six dollars and eighty-five cents, which said judgment was duly docketed in the office of the clerk of the city and county of New York, on the said 3d day of February, 1876, and that said judgment and every part thereof remains due and unsatisfied. That afterwards, and on the 10th February, 1876, execution was issued on said judgment, to the sheriff of the city and county of New York, directing him to satisfy said judgment out of the personal property of said debtor, and if sufficient personal property of such debtor could not be found out of the real property belonging to him, the said debtor, on the day when the said judgment was docketed, in the said county, or at any time thereafter, and that afterwards, and on the 12th day of May, 1876, the said sheriff returned
18 said execution to the office of the said clerk of the city and county of New York wholly unsatisfied, and that at the time of the recovery of the said judgment and the issuing and return of said execution the said William H. Locke did not reside nor did he have a place of business in this State, but was at the time and times aforesaid a resident of the State of New Jersey.

II. That afterwards, and on or about the 23d day of April, 1876, certain proceedings supplemental to the return of said execution unsatisfied were instituted against the said William H. Locke on said judgment, under and pursuant to section 292 of the code of procedure, and that the said William H. Locke was examined therein before one of the judges of the supreme court at the city and county of New York, and on the twenty-seventh day of May, 1876, at the said city of New York, upon the application of the said Wilhelm Pickhardt and Adolf Kuttroff, the judgment

creditors of the said William H. Locke in said supplementary proceedings, the plaintiff was, by consent of the parties, and by an order of the honorable Charles Donohue, one of the justices of the supreme court, at a special term of said court, duly appointed receiver of the property of the said William H. Locke, and the said order was, on the 6th day of June, 1876, filed and recorded in the office of the clerk of the city and county of New York, and on the said 7th June, 1876, a certified copy of said last mentioned order was delivered to the plaintiff as such receiver. That afterwards, and on the 7th day of June, 1876, the plaintiff as such receiver, under and pursuant to the said order appointing him such receiver, caused to be executed a bond with two sureties to the people of the State of New York, in the penalty of twenty-five hundred dollars, conditioned that if the plaintiff as such receiver should faithfully discharge the duties of the trust as such receiver, then said obligation to be void, otherwise to be in full force and effect, which said bond was, on the said 7th day of June, 1876, duly approved by Hon. Charles Donohue, one of the justices of the said court, and on the same day the said bond
19 was filed in the office of the clerk of the city and county of New York.

III. That on the 7th day of June, 1876, the plaintiff, as such receiver, presented a petition to the supreme court, at a special term thereof, held at the New York County court-house, in the city of New York, asking for an order granting to this plaintiff, as such receiver, authority to commence, continue, and perfect an action in one of the courts of record in the State of New York, and in such form as counsel may advise against the above-named defendants, which said order was on the same day granted, and this action is commenced in accordance therewith, and by and under the authority of the said order of this court, which said order was on the said 7th day of June, 1876, duly filed in the office of the clerk of the city and county of New York.

IV. That on or about the twenty-third day of September, in the year one thousand eight hundred and seventy-five, the said defendant, William H. Locke, then being a resident of the State of New Jersey, under and pursuant to an act of the legislature of that State, entitled "An act to secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors," approved April 16, 1846, and the several acts amendatory thereto, made and delivered to the defendants, William King, John M. Goetchius, and Edward E. Poor, all doing business in the city of New York, an assignment of all his property for the alleged benefit of his creditors, of which the following is a copy:

20 William H. Locke to William King et al.

"This indenture, made the twenty-third day of September, A. D. eighteen hundred and seventy-five, between William H. Locke, of Passaic, New Jersey, of the first part, and William King, of Tenafly, in the State of New Jersey, John M. Goetchius, of the city, county, and State of New York, and Edward E. Poor, of Lodi, in the State of New Jersey, of the second part, witnesseth, that the said William H. Locke, for the purpose of securing to his creditors an equal distribution of his estate, and for the consideration of one dollar to him paid by the said parties of the second part, hath, and by these presents doth grant, bargain, sell, and

convey and assign unto the said parties of the second part, and the survivors of them, and their and his heirs and assigns, all and singular, the lands, tenements, hereditaments, and real estate and interest therein, whereof the said William H. Locke is now seized or possessed, or is in any way entitled unto, wheresoever the same be situate, together with the appurtenances, and also all and singular his goods and chattels, bonds, notes, books of account, contracts, rights, and credits, and other personal property whatsoever and wheresoever, except property exempt by law from execution, to have and to hold to the said parties of the second part, and the survivor of them, their, and his heirs and assigns, forever; in trust, to take possession of and collect and to sell and dispose of the same at public or private sale in their discretion, and to distribute the proceeds to and among the creditors of the said William H. Locke, in proportion to their several just demands, pursuant to the statutes in such case made and pro-
21 vided, and on the further trust to pay the surplus, if any there be, after fully satisfying and paying the said creditors and all proper costs and charges to the said William H. Locke.

"In witness whereof the said William H. Locke hath hereunto set his hand and seal the day and year first above written.

"WILLIAM H. LOCKE. [L. S.]

"Sealed and delivered in the presence of (Englewood struck off, and Tenafly interlined before the execution)—

"WILLIAM H. BOWERS.

"STATE OF NEW YORK,

"*City and County of New York, ss:*

"Personally appeared before me on the twenty-third day of September, A. D. eighteen hundred and seventy-five, William H. Locke, who, I am satisfied, is the grantor in the foregoing deed named, and I having first made known to him the contents thereof, he did thereupon acknowledge before me that he had signed, sealed, and delivered the same as his voluntary act and deed.

"In witness whereof I have hereunto set my hand and affixed my official seal.

"WILLIAM H. BOWERS,

"*Foreign Commissioner for New Jersey in N. Y.*"

And that the said defendants William King, John M. Goetchius, and Edward E. Poor accepted the trusts reposed in them by said assignment, and have from time to time received, under and by virtue of said assignment, a large amount of property, some of which was personal property in the city of New York, and have now in their possession, or under their control, a large amount of money in the city of New York; but all of said property was, is, and will be wholly insufficient to pay the debts of said William H. Locke.

22 V. That the indebtedness on which the said Wilhelm Pickhardt and Adolf Kuttroff recovered their said judgment against the said defendant, William H. Locke, arose and accrued before the making of said assignment by him, and in the city of New York, where the said Pickhardt and Kuttroff both at that time resided and still reside.

VI. That in and by said act of the legislature of the State of New Jersey it is among other things provided and enacted as follows:

14. "Nothing in this act shall be taken or understood as discharging said debtor or debtors from liability to their creditors who may not choose to exhibit their claims, either in regard to the persons of such debtors or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors or their representatives, unless on the trial of such action or hearing in equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment or concealing of his estate, real or personal, whether in possession, held in trust, or otherwise," as by said act will more fully and at large appear.

VII. That the said Wilhelm Pickhardt and Adolf Kuttroff have not, nor has either of them, nor any one for them, exhibited their said claim, demand, and judgment, either in regard to the person of such debtor or to any estate, real or personal, not assigned as aforesaid or otherwise.

VIII. This plaintiff further alleges that the said act of the legislature of the State of New Jersey under and pursuant to which the said assignment was executed was by operation of the Revised Statutes of the United States, title Bankruptcy, and under an act of Congress of the United States, entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2d, 1867, and for other purposes,'" aproved June 22d, 1874, suspended and of no effect.

23

IX. The plaintiff further alleges that the said act of the legislature of New Jersey is contrary to and in violation of the statutes of the State of New York, wherein it is provided that "All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors existing or subsequent of such persons;" and also of the said statute of this State, wherein it is provided that "Every conveyance or assignment in writing, or otherwise, of any estate or interest in lands, or in goods, or in things in action, or any rents or profits issuing therefrom, and every charge upon lands or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages for failures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent as against the person so hindered, delayed, or defrauded, shall be void." And that said assignment is by the laws of the State of New York fraudulent and void as against this plaintiff as such receiver.

X. The plaintiff further alleges that the said assignment is fraudulent and void by the laws of the State of New Jersey, in this: That the said defendant, William H. Locke, at the time of making such assignment, had a large amount of money and other property which he fraudulently retained to his own use, and the said assignment was made by the said defendant Locke with the intent to hinder, delay, and defraud his creditors.

Wherefore the plaintiff demands judgment against the said defendants;

24 that the said assignment be adjudged fraudulent and void; that an injunction issue and that a receiver be appointed, and that the defendants account to the plaintiff for all the property and money received or to which they are entitled under and by virtue of said assignment, and that the plaintiff have such other and further relief as to the court shall seem meet.

C. BAINBRIDGE SMITH,
Attorney for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas Boese, the above-named plaintiff, being duly sworn, says that the foregoing complaint is true of his own knowledge except as to those matters which are therein stated to be on information and belief, and as to those matters he believes it to be true.

THOMAS BOESE.

Sworn to before me this 10th day of July, 1876.

ABRAHAM KLING,
Com. of Deeds, N. Y. Co.

25 Supreme court, city and county of New York.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM H. LOCKE, IMPLEADED WITH WM. King, and others.

The defendant William H. Locke, for his answer to the complaint herein, by Arnold, Elliott & White, his attorneys, shows:

First. He admits the recovery of the judgment by Wilhelm Pickhardt and Adolf Kuttroff against him, and the issuing and return unsatisfied of execution thereon, and that the judgment remains unpaid.

Second. He admits that at the time of the said recovery and issuing and return of execution, he resided in the State of New Jersey, and had no place of business in this State.

Third. He admits that proceedings were instituted against him supplemental to said execution, and that he was examined thereunder as stated in the complaint, and the appointment of plaintiff as receiver; but he denies that plaintiff was appointed such receiver by his consent, but avers that he opposed and resisted the appointment of any receiver upon, among other grounds, the ground that such examination had not disclosed any assets or property belonging to defendant for which a receiver should or could be appointed.

26 Fourth. He has no knowledge or information, sufficient to form a belief, as to whether any order, appointing plaintiff such receiver, was ever filed, or whether any bond was ever made or filed by such receiver or approved by the court, or as to whether said receiver ever presented any petition to the supreme court for an order granting to him, as such receiver, authority to commence, continue, and perfect an action in one of the courts of record of this State against the defendants in this action, nor as to whether or not said order was at any time granted, nor as

to whether or not this action is commenced in accordance therewith or by authority thereof, nor as to whether or not such, or any order to that effect was ever filed, as in the complaint in such behalf alleged.

Fifth. The defendant, further answering, says that he admits the making and delivery to the defendants King, Goetchius, & Poor by him, this defendant, of an assignment, for the purpose of securing to his creditors an equal distribution of his estate, a copy of which is set forth in said complaint. And he further says, that while said assignment was so drawn and executed as to conform to the regulations and requirements of an act of the legislature of the State of New Jersey, entitled "An act to secure to creditors an equal and just distribution of the estates of debtors, who convey to assignees for the benefit of creditors," approved April 16, 1846. It nevertheless is, and was valid and effectual as a common-law assignment, whether the said act be or be not suspended; and except as above stated, he denies that said assignment was executed under or in pursuance of said act or of the acts mentioned in said complaint.

Sixth. He further admits that the said defendants Goetchius, King & Poor accepted the trusts reposed in them by said assignment, and have from time to time received, under and by virtue thereof, the property, real and personal, therein referred to.

27 Seventh. He had no knowledge or information sufficient to form a belief, as to what, if any, part of said property, or any proceeds thereof, are now in the possession or under the control of said assignees; or whether any part of the same is now, or was, at, or at any time since the commencement of this action, in the city or State of New York; but he admits that the assigned property was and is sufficient to pay in full the debts of this defendant.

Eighth. He admits that the indebtedness upon which said Pickhardt & Kuttroff recovered said judgment arose and accrued before the making of the assignment aforesaid, but alleges that the same arose and accrued in the State of New Jersey; and further, says he has no knowledge or information, sufficient to form a belief, as to the residence of said judgment creditors at the time said debt accrued, or at any other time or times.

Ninth. He avers that he has no knowledge or information, sufficient to form a belief, as to whether the said judgment creditors have, or have not, exhibited their claim, demand, and judgment, either in regard to the person of this defendant, or to any estate, real or personal, not assigned as aforesaid or otherwise.

Tenth. Defendant, further answering, upon his information and belief, denies that the act of the legislature of the State of New Jersey, mentioned and referred to in the section, paragraph, or subdivision of said complaint numbered "VIII," was by operation of the Revised Statutes of the United States, title "Bankruptcy," and under an act of Congress of the United States to amend and supplement an act entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and for other purposes," approved June 22, 1874, or otherwise suspended, and of no effect.

Eleventh. Defendant, further answering, upon information and belief, denies that the aforesaid act of the legislature of the State of New Jersey is contrary to and in violation of the statutes of the State of New York

28 mentioned and referred to in the section, paragraph, or subdivision

of the said complaint, numbered IX, and denies that the said act of the legislature of the State of New Jersey is contrary to and in violation of either of said statutes, and denies that the said assignment is by the laws of the State of New York or otherwise, fraudulent and void as against the plaintiff as receiver aforesaid, or otherwise.

Twelfth. Defendant, further answering, upon information and belief, denies that the said assignment is fraudulent and void by the laws of the State of New Jersey, for the alleged reason, or upon the alleged ground mentioned in the section, paragraph, or subdivision of said complaint numbered X.

Thirteenth. He denies that at the time of making said assignment, he, this defendant, had a large amount of money and other property, which he fraudulently retained to his own use.

Fourteenth. He denies that he made said assignment with the intent to hinder, delay, and defraud his creditors. Wherefore he prays that said complaint be dismissed with costs.

ARNOLD, ELLIOTT & WHITE,
Attorneys for Defendant Wm. H. Locke,
No. 7 Beekman street, New York City.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

William H. Locke, being duly sworn, says that he is the defendant in the foregoing answer named; that said answer is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LOCKE.

Sworn to before me this 19th day of September, 1876.
HENRY WINANS,
Notary Public, City and Co. of New York.

29 Supreme Court.

THOMAS BOESE, RECEIVER OF THE PROPERTY OF William H. Locke, plaintiff,
against
WILLIAM KING, JOHN M. GOETCHIUS, AND EDWARD E. POOR, assignees of William H. Locke, impleaded with said Locke, defendants.

The above-named defendants, by Martin & Smith, their attorneys, answer the complaint of the above-named plaintiff, and say:

First. They have not any knowledge nor information sufficient to form a belief as to whether or not, on the third day of February, 1876, or at any other time, Wilhelm Pickhardt and Adolf Kuttroff, mentioned in the complaint, recovered the judgment therein mentioned against the defendant, William H. Locke; nor as to whether the said judgment was duly or otherwise docketed in the office of the clerk of the city and county of New York, at the time in that behalf alleged in said complaint, or at any other time; nor as to whether or not said judgment, and every part thereof, remains due and unsatisfied, nor as to whether or not, on the tenth of February, 1876, or at any other time, execution was issued on said judgment

to the sheriff of the city and county of New York, in manner and form as stated in said complaint, or otherwise, nor as to whether or not, on the twelfth day of May, 1876, or at any other time, the said sheriff re-
30 turned said execution to the office of the clerk of the city and county of New York wholly unsatisfied, or otherwise, and they therefore controvert the several allegations in that behalf in the said complaint contained.

And, further answering, these defendants say that they have not any knowledge nor information sufficient to form a belief as to whether or not the said defendant, Locke, had a place of business in this State at the time of the recovery of the said judgment, and the issuing and return of said execution; but, on information and belief, they admit that at said several times the said defendant, Locke, resided in the State of New Jersey.

Second. The said defendants, further answering the said complaint, say that they have not any knowledge nor information sufficient to form a belief as to whether or not, on or about the twenty-third day of April, 1876, or at any other time, any proceedings supplemental to the return of said alleged execution unsatisfied were instituted against the said defendant, Locke, on said judgment, as alleged in the said complaint, or otherwise; nor as to whether or not the said defendant, Locke, was examined therein as is in said complaint alleged, or otherwise; nor as to whether or not, on the twenty-seventh day of May, 1876, or at any other time, upon the application of the said Wilhelm Pickhardt and Adolf Kuttroff, or otherwise, the plaintiff was, by consent of the parties, or otherwise, appointed receiver of the property of the said defendant, Locke, as is in said complaint alleged, nor as to whether or not the alleged order appointing said plaintiff such receiver, was, on the sixth day of June, 1876, filed and recorded in the office of the clerk of the city and county of New York, nor as to whether or not, on the seventh day of June, 1876, a certified copy of said alleged order was delivered to the plaintiff, as such receiver or otherwise, nor as to whether or not, on said seventh day of June, 1876, the plaintiff, as such receiver, or otherwise, caused to be executed a bond, conditioned for the faithful discharge of the duties of his alleged trust
31 as such receiver, in manner and form as is alleged in said complaint, nor as to whether or not said bond was, on the 7th day of June, 1876, or at any other time, approved in manner and form as is in said complaint alleged, or otherwise; nor as to whether or not the said bond was filed in the office of the clerk of the city and county of New York, as is in said complaint alleged, or otherwise; and these defendants therefore controvert the several allegations in that behalf in said complaint contained.

Third. The said defendants, further answering the said complaint, say that they have not any knowledge nor information sufficient to form a belief as to whether or not on the seventh day of June, 1876, or at any other time, the plaintiff, as receiver or otherwise, presented a petition to the supreme court for an order granting to him, as such alleged receiver, authority to commence, continue, and perfect an action in one of the courts of record in this State against the defendants in this action as is in said complaint alleged, nor as to whether or not said order was on the same day, or at any other time, granted, nor as to whether or not this action is commenced in accordance therewith, nor as to whether or not said order was on the sev-

enth day of June, 1876, filed in the office of the clerk of the city and county of New York, as is in said complaint alleged or otherwise; and these defendants therefore controvert the several allegations in that behalf in said complaint contained.

Fourth. The said defendants, further answering the said complaint, admit the making and delivery to them by the defendant, Locke, of the assignment, for the purpose of securing to his creditors an equal distribution of his estate, a copy of which is set forth in said complaint.

And they further say, on information and belief, that while said assignment was so drawn and executed as to conform to the regulations and requirements of an act of the legislature of the State of New Jersey, entitled "An act to secure to creditors an equal and just division of
32 the estates of debtors who convey to assignees for the benefit of creditors, approved April 16th, 1846," it nevertheless was and is valid and effectual as a common law assignment, whether the said act be or be not suspended; and, except as above stated, they deny on information and belief that said assignment was executed under or in pursuance of said act, or of the acts mentioned in the complaint.

They further admit that they accepted the trusts reposed in them by said assignment, and have from time to time received, under and by virtue thereof, the property, real and personal, therein referred to, and they aver that the schedule hereto annexed, marked A, contains a list of all the property, real and personal, received by them under and by virtue of said assignment.

And they admit that they have now in their possession and under their control in the city of New York, certain moneys, proceeds of the property, real and personal, so assigned and transferred to them by the said defendant, Locke.

And they further admit that all of the property of said defendant, Locke, so assigned and transferred to them under and pursuant to said assignment, was and is insufficient to pay the debts of said defendant, Locke, in full.

Fifth. These defendants, further answering, say that they have not any knowledge nor information sufficient to form a belief as to whether or not the indebtedness on which the said Wilhelm Pickhardt and Adolf Kuttroff recovered their alleged judgment against the said defendant, Locke, arose and accrued before the making of said assignment by him to these defendants, nor have they any knowledge nor information sufficient to form a belief as to whether or not the said alleged indebtedness accrued in the city of New York, nor as to whether or not the said Pickhardt and Kuttroff, or either of them, at that time resided, nor as to whether or not they
or either of them reside in the city of New York.

33 Sixth. Further answering, these defendants say that they have not any knowledge nor information sufficient to form a belief as to the matters alleged in the section or paragraph of said complaint, numbered "VII," and they therefore controvert the several allegations in said VII section or paragraph of said complaint contained.

Seventh. The said defendants, further answering, on information and belief, deny that the act of the legislature of the State of New Jersey, mentioned or referred to in the section or paragraph of said complaint numbered "VIII," was, by operation of the Revised Statutes of the United

States, title Bankruptcy, and under an act of Congress of the United States entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and for other purposes,' approved June 22, 1874," or otherwise, suspended and of no effect.

Eighth. The said defendants, further answering, on information and belief, deny that the said act of the legislature of the State of New Jersey is contrary to and in violation of the statutes of the State of New York mentioned and referred to in the section or paragraph of said complaint numbered "IX," and deny that the said act is contrary to, and deny that it is in violation of, either of said statutes; and, on like information and belief, the said defendants deny that the said assignment is by the laws of the State of New York, or otherwise, fraudulent and void as against the plaintiff, as receiver, or otherwise.

Ninth. These defendants, further answering, on information and belief, deny that the said assignment is fraudulent and void by the laws of New Jersey for the alleged reason or on the alleged ground mentioned in the section or paragraph of said complaint numbered X, and they, on like information and belief, deny that the defendant Locke at the time of making such assignment had a large amount of money and other
34 property which he fraudulently or otherwise retained to his own use, as is in said complaint alleged; and they, on like information and belief, deny that the said assignment was made by the said defendant Locke with the intent to hinder, delay, and defraud his creditors.

Wherefore they pray that the said complaint be dismissed with costs.

MARTIN & SMITH,
Defendants' Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

William King, John M. Goetchius, and Edward E. Poor, the defendants above named, being severally duly sworn, say, each for himself, that the foregoing answer is true of his own knowledge except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM KING.
EDWARD E. POOR.
J. M. GOETCHIUS.

Severally sworn to, before me, this 15th day of Sept., 1876.

WM. B. LYNES,
Notary Public, Kings Co., with certificate filed in N. Y. Co.

35 SCHEDULE A.

Referred to in the foregoing answer.

An inventory of the estate, real and personal, of William H. Locke, of Passaic, New Jersey, party of the first part, named in assignment assigned to William King, of Tenafly, New Jersey, John M. Goetchius, of New York, and Edward E. Poor, of Lodi, New Jersey, for the benefit of his creditors.

INVENTORY OF ESTATE.

Cash on hand	$2,363 87
Open accounts, satinet bills, estimated	79 50

Open account, Peabody Mills, Massachusetts, dyeing, estimated		3,500 00
Goods in process, at Passaic, New Jersey, estimated		3,000 00
Supplies at Passaic, New Jersey, estimated		10,000 00
Print-works at Passaic, estimated	$250,000 00	
Less mortgage of	106,000 00	
		144,000 00
House at Passaic, New Jersey, cost	8,500 00	
Subject to mortgage	5,000 00	
Estimated value of interest in same		3,500 00
House at Arlington, Massachusetts, cost	1,200 00	
Subject to mortgage of	1,000 00	
Estimated value of interest therein		200 00
Household furniture at Passaic, New Jersey, estimated		1,000 00
The valuation of $250,000 for the print-works is only an estimate, and is not intended as fixing the value of that property at said sum, such value being entirely conjectural and dependent upon circumstances.		
Amount due from Chase, Stewart & Co., estimated		10,000 00

36 At a special term of the supreme court of the State of New York, held in and for the city and county of New York, at the city hall in said city, on Friday, the 23d day of March, 1877.

Present, Hon. C. H. Van Brunt, justice.

THOMAS BOESE, &c.,
against
WILLIAM H. LOCKE AND OTHERS.

Ordered judgment for plaintiff with costs and allowance of five per cent. A copy.

HENRY A. GUMBLETON, *Clerk.*

Fees paid, $1.10. E. M'C.

At a special term of the supreme court, held at the New York County court-house, in the city of New York, on the first Monday of May, 1877.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius, and Edward E. Poor, assignees of said Locke.

The above action having been tried before me at a special term of this court for the trial of issues of fact without a jury, I find as facts:

37 I. On April 16, 1846, an act of the legislature of the State of New Jersey was passed, which act is in the words and figures following: "An act to secure to creditors an equal and just division of the

estates of debtors who convey to assignees for the benefit of creditors." Revision approved April 16, 1846.

1. Every conveyance or assignment made by a debtor or debtors of his, her, or their estates, real or personal or both, in trust to the assignee or assignees for the creditors of such debtor or debtors, shall be made for the equal benefit in proportion to their several demands to the net amount that shall come to the hands of said assignee or assignees for distribution, and all preferences of one creditor over the other, or whereby any one or more shall be first paid or have a greater porportion in respect to his, her, or their claim than another, shall be deemed fraudulent and void, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors.

2. The debtor or debtors making such assignment sha ll annex to such assignment or conveyance an inventory, under oath or affirmation of his, her, or their estate, real and personal, according to the best of their knowledge, together with a list of his, her, or their creditors, and the amount of their respective claims, but that such inventory shall in no wise be conclusive as to the quantum of the debtor's estate, real and personal, but the assignee or assignees shall be entitled to any other property which may belong to the debtor or debtors at the time of making the assignment and comprehended within the general terms of the same.

3. The said assignee or assignees shall forthwith give three weeks' public notice by advertising in two of the newspapers printed in this State, circulating in the neighborhood where such creditors reside, and in one or more newspapers in any other State where it shall be known any creditor of the said assignor resides, making known thereby that such assignment has been made, and that the creditors present their claims under oath
38 or affirmation, and the said assignee or assignees shall also forthwith exhibit to the surrogate of the county wherein such debtor or debtors reside, under oath or affirmation, a true inventory and valuation of said estate so far as has come to his or their knowledge, and then and there enter into bond to the ordinary of the State in double the amount of the inventory and valuation, with sufficient security for the faithful performance of said trust, which bond, inventory, and valuation being first filed in the surrogate's office, the said assignee or assignees may then proceed to sell said estate and perform every other duty necessary to carry into effect the intention of said assignment so far as respects the collection of debts and the sale of real or personal estate.

4. After the said assignee or assignees shall have given bond as aforesaid for the faithful performance of said trust, the surrogate shall endorse the receipt of said bond on the deed of assignment, after which endorsement the clerk of the county shall record the same, having been first acknowledged or proved according to law.

5. At the expiration of three months from the date of said assignment the said assignee or assignees shall file with the clerk of the court of common pleas of the county wherein such debtor or debtors reside at the time of making such assignment a true list, under oath or affirmation, of all such creditors of said debtors as shall claim to be such, with a true statement of their respective claims, having first advertised for six weeks next preceding the end of said term in two of the newspapers printed in this

State, and by putting up advertisements in five of the most public places in the neighborhood wherein such creditors or a majority of them reside, making known thereby that all claims against said estate must be made as hereinafter prescribed or be forever barred from coming in for a dividend of said estate otherwise than hereinafter provided.

6. It shall be lawful for the assignee or assignees or any creditor or other person interested, by himself or attorney, to appear at the next term of the said court of common pleas and file exceptions to the claim or demand of any creditor exhibited as aforesaid, and said court shall cause a notice to be served on said creditor at least four weeks preceding the next term, and shall then proceed to hear the proofs and allegations in the premises in the same or any subsequent term as may be expedient, allowing the parties a right to have the said controversy settled by jury.

7. At the first term of said court succeeding the expiration of three months as aforesaid, should there be no exceptions made to the claim of any creditor or if exceptions have been made and adjudicated or settled by said court, the said assignee or assignees shall then proceed to make, from time to time, fair and equal dividends among said creditors of the assets which shall come to hand in proportion to their claims, and as soon as may be, and not exceeding one year thereafter, shall render, on oath or affirmation, a final account to the orphan's court of said county in like manner and upon the same notice to creditors and others interested as is now or may hereafter be directed in regard to executors and administrators, and exceptions may in like manner be filed to such accounts and proceeded in as prescribed in regard to executors and administrators, and the settlement and decree of said court shall be conclusive on all parties except for assets which may afterwards come to hand or for frauds or apparent error.

8. Such commissions and allowances shall be made to said assignee or assignees in the final settlement aforesaid as the said court shall consider just and right.

9. The said court may, from time to time, if necessary, by citation and attachment, compel said assignee or assignees to proceed to the execution of the duties required by this act until a final settlement and distribution as aforesaid.

10. Any creditor may not only exhibit any debt due, but those to grow due, making in such case a reasonable rebate when interest is not accruing on the same.

11. If any creditor shall not exhibit his, her, or their claims within the term of three months as aforesaid, such claim shall be barred of a dividend unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditor shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a rateable proportion therefrom.

12. Whenever any assignee or assignees, as aforesaid, shall sell any real estate of such debtor or debtors as is conveyed in trust as aforesaid, he or they shall proceed to advertise and sell the same in manner as is now or may hereafter be prescribed in the case of an executor or administrator directed to sell lands by an order of the orphan's court for the payment of the debts of the testator or intestate.

13. Every assignee, as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the said debtor or debtors had at the time of the assignment, and to sue for and recover in the proper name of such assignee or assignees everything belonging or appertaining to said estate, real or personal, of said debtor or debtors, and shall have full power and authority to refer to arbitration, settle and compound and to agree with any person concerning the same, and to redeem all mortgages and conditional contracts, and generally to act and do whatsoever the said debtor or debtors might have lawfully done in the premises.

14. Nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the persons of such debtors or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors or their representatives, unless on the trial of such action or hearing in
41 equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise.

15. The same fees shall be allowed in all proceedings under this act to the judges and officers of the orphans' court as are allowed for like services performed in the settlement of accounts of executors or administrators under the laws of this State.

16. If the assignee or assignees who have been appointed and have given surety according to the provisions of this act should die before the final settlement of said estate, it shall be lawful for said surety to proceed to the final settlement of said estate, and perform every duty the said assignee or assignees could rightfully have performed, the said surety having first given additional surety for their faithful performance as aforesaid.

17. In case the said surety should die or reasonable objections be made by the creditors against his acting as aforesaid, or refuse to act, the said orphans' court shall proceed to appoint some suitable person or persons to settle the same.

18. Whenever the security given by any assignee under and by virtue of the third section of this act shall be insufficient at the time of giving the same, or shall afterwards become insufficient, then it shall be the duty of the orphans' court of the county in which the assignor resided at the time of making the assignment, to order and direct such assignee to give such further or other security to the ordinary by bond in the usual form, as to the said court, after hearing the objection of creditors or persons concerned, shall seem proper, and if it should appear upon examination that any assignee hath embezzled, wasted, or misapplied all or any part of the estate assigned to him, or shall neglect or refuse to give such additional security as may be ordered, then and in every such case the said court shall proceed to remove said assignee, and appoint some
42 suitable person or persons in his stead to fulfil the trust contained in the deed of assignment, who shall give bond with security in manner aforesaid, and shall thereupon have all the power and authority of the said assignee under the deed of assignment, and be subject to the same duties and liabilities; and the assignee so appointed by the orphans' court

shall have actions of trover, detinue, or on the case for such goods, chattels, or monies as come to the possession of the assignee so removed as aforesaid, and shall be retained, wasted, embezzled, withheld, or misapplied, and no satisfaction made for the same.

19. In all cases where any debtor being a tenant, shall make an assignment under this act, all the goods and chattels of such tenant on the premises in the possession of such tenant, shall be first bound for the payment of rent due to his landlord; and the said claim for rent in favor of the landlord, not exceeding one year's rent, shall be first paid and satisfied by the assignee out of the goods and chattels of the said tenant which were on the demised premises at the time of the assignment.

20. If the tenant, his assignee, or any other person or persons shall remove any goods and chattels off or from the said demised premises after the said assignment, it shall and may be lawful for the said landlord at any time within forty days after such removal, to seize the said goods and chattels in whose hands soever the same may be found as a distress for his said rent, and proceed with the same in the manner directed by the act concerning distresses, whether the rent by the terms of the lease be due or not, making a rebate on the sum not due, as is now or may hereafter be required; where a party sueing out execution pays rent not due to the landlord.

II. On April 16, 1846, another act of the legislature of the State of New Jersey was passed in the words and figures following: "An act for the relief of persons imprisoned on civil process."

1. Any person who now is or hereafter shall be in actual con-
43 finement for debt or damages in any of the jails in this State, and is willing to deliver up to his creditor or creditors, all his estate, both real and personal, towards the payment of his creditor or creditors, shall have leave to present a petition to the court of common pleas, in and for the county wherein he is so imprisoned, at any stated term thereof, setting forth the cause or causes of his imprisonment, containing, also, a just and true account of all his real and personal estate; a full and true inventory of all his deeds, bonds, notes, books of account, vouchers, and securities whatsoever; together, also, with a list of all his creditors, with the moneys due and owing to each of them, to the best of his knowledge.

2. The court to whom such application is made, are required to name the time and place at which they will attend to hear what can be alleged for or against the liberation of such debtor, which time shall not be less than forty days after making said application, of which time and place so appointed by the court, the debtor shall cause notice in writing, at least thirty days previous thereto, to be served on or left at the usual place of residence of each of his creditors, if residing within the State, and have the same inserted in one of the newspapers of the State.

3. At the time and place so appointed, the debtor applying to the court as aforesaid shall appear before the said court and exhibit a just and true account of all his estate, both real and personal, either in possession, reversion, or remainder, together with a just and true inventory of all his deeds, bonds, notes, books of account, vouchers, specialties whatsoever, with the sums due thereon as near as may be, and a list of all his creditors, with the amount of debts to them due and owing; and the court shall proceed to hear, consider, and examine into the truth and justice of such

application or petition so as aforesaid made and presented, and to consider and examine the truth and fairness of the account and inventory so exhibited before the said court.

4. Such examination shall be had in open court, and on interrogatories proposed by the court to such debtor, touching and concerning the
44 disposition of his estate, the truth and fairness of the account and inventory so as aforesaid exhibited, and the debtor shall, on his oath or solemn affirmation, make a true and direct answer of and concerning the same to all such questions as shall, be asked him by the court, and if the debtor to such interrogatories shall, knowingly, falsely swear or affirm, such debtor shall be adjudged guilty, and liable to the pains and penalties of wilful and corrupt perjury.

5. It shall also be the duty of the court at the time of hearing to examine the debtor touching his confinement, whether his imprisonment was compulsory or voluntary, and whether he has not at any time between the day of his application to the court for his hearing and the time of his examination been without the prison limits, to all which and such other questions as shall be asked by the creditor, under permission of the court, the debtor shall full answer make, subject to the requirements and liabilities in this act prescribed. And if it shall appear that the debtor has been without the prison limits, or that his confinement was not compulsory, or he will not a satisfactory answer make to the questions proposed, it shall be the duty of the court to stay all further proceedings in the case.

6. If, after the hearing, consideration, and examination of the proofs and allegations of such debtor, the court and the creditor or creditors that may attend shall be satisfied that the conduct of the debtor has been fair, upright, and just, the court shall proceed forthwith to appoint one or more respectable, judicious, and responsible freeholder or freeholders of the county where such debtor may be imprisoned, as assignee or assignees, to which said assignee or assignees the debtor shall forthwith execute an assignment of all his real and personal estate, wheresoever or whatsoever, except such apparel for himself, his wife, and children, and such tools and implements of his trade or occupation as the court may judge proper, not exceeding the value of twenty-five dollars in the whole; and except also such property of the said debtor as is or may be by law ex-
45 empted from execution, upon making which assignment and filing the same in the clerk's office of the said court, the court may, by writing under their hands and seals, direct the sheriff to discharge said debtor from confinement on account of any debts by him previously contracted.

7. Upon the death or removal from this State of any assignee appointed under the sixth section of this act, it shall and may be lawful for the court in which such appointment was made, on application, and being satisfied that the same is just and reasonable, to appoint another in the place of such dead or removed assignee, and an entry of such order and appointment shall be made in the minutes of the court, upon which such newly appointed assignee shall have and possess all the powers, rights, and interests in the estate of the insolvent debtor that were vested in the deceased or removed assignee, and execute all such conveyances, and do all such lawful acts and things as the said dead or removed assignee might or ought to have done, and the same shall be as valid as if done by the

deceased or removed assignee; and in case there be a coassignee or assignees not dead or removed, shall and may act, do, and complete all things with him or them, as the said deceased or removed assignee might or ought to have done.

8. If the creditor or creditors at whose suit such debtor is imprisoned, or any other creditor shall not be satisfied with the truth and honesty of the declaration and confession of such debtor, nor with the truth and fairness of the account and inventory, so as aforesaid to be exhibited, and such creditor or creditors shall offer and undertake to the court to prove, by the first day of the next term, that such debtor has concealed and secreted some part of his estate, and has not fairly, fully, and honestly delivered up to the use and benefit of his creditors the whole of his estate, real and personal, it shall and may be lawful for the court to remand such debtor to prison, and direct such debtor and the said creditor or creditors so dissatisfied as aforesaid to appear before the court
46 on the first day of the next term; provided that such creditor or creditors so dissatisfied shall and do agree, by writing under his or their hands, to allow and pay any sum that the court may direct, not exceeding two dollars per week, to and for the support of such debtor, to be paid to the debtor or left with the jailor, at such time and in such sums as the creditor or creditors may choose; provided the said allowance be not withheld for a space longer than one week at any one time, and on failure of payment of which weekly sum such debtor shall, on application to the court or any three judges thereof, be forthwith, by order as aforesaid, discharged; provided, also, that if such creditor or creditors so dissatisfied shall prove that such debtor hath concealed and kept back any part of his estate, he or they shall be reimbursed the expense of supporting such debtor out of the estate of such debtor.

9. After such debtor shall be remanded to prison as aforesaid he shall, within thirty days, file in the clerk's office of said court a declaration to the following effect, to wit: Hunterdon (or other county, as the case may be), to wit: A (name of debtor) cometh before the court and sayeth that he ought, against his creditors, to be discharged out of custody for debt, because he sayeth that he hath become, according to the force, form, and effect of an act of the legislature, entitled "An act for the relief of persons imprisoned on civil process," and within the true intent and meaning of such act, an insolvent debtor, and that he hath well and truly complied with the said act and all things on his part for the benefit and to the use of his creditors, to wit: On the first day of March, in the year of our Lord one thousand seven hundred and ninety-five (or other time, as the case may be), at the township of Amwell, in the county of Hunterdon (or other place), whereby good right and full title by virtue of the said act hath accrued to him against his creditors, to be discharged out of the custody for debt, and this he is ready to verify. Wherefore he prayeth judgment of discharge out of custody for debt, according to the force, form, and effect of the said act; that within twenty days after filing said declaration, but not
47 afterwards, all the creditors of said debtor, or any one of them, may file in the clerk's office of said court, his, her, or their plea to the following effect, to wit: B, C, D (the names of the creditors), come before the court, and say that the said A is not an insolvent debtor, and that he hath not well and truly complied with the said act in all things on his part

for the benefit and to the use of his creditors in manner and form as the said A hath thereof declared against his creditors, and of this they put themselves upon the country that the debtor may join issue with the creditor or creditors by filing in the office of the said court the replication of the debtor to the following effect, to wit, and the said A doth so likewise. That if the trial of the issue joined as aforesaid between the debtor, as plaintiff, of the one part, and all the creditor or creditors as defendant or defendants of the other part, in one action, and not in two or more actions, the debtor do cause a venire facias to issue, directed to the sheriff, requiring him to summon twelve respectable freeholders of the county to make a jury between the said parties, the debtor file in the office of the said court lawful notice of trial to the creditor or creditors named in his, her, or their plea to cause the issue joined as aforesaid to be tried in turn before the court by the said jury to be summoned by the sheriff of the county as aforesaid, that the trial on the said issue shall be had only between the debtor named in the declaration, and the creditor or creditors named in the plea, and not between the debtor and other creditors; that all proceedings had under this act on the part of the debtor may, on trial of the issue, if joined as aforesaid, be before the court and jury deemed competent, but not conclusive evidence on his part, and that the debtor do, on the trial of the issue before the court and jury, further than by the proceedings aforesaid, prove in evidence and maintain the truth and legality of his case according to the issue on his part joined, and that if the jury do find a verdict for the debtor the court do render judgment that the debtor be discharged out of custody, according to the force, form, and effect of the said act; that if the jury do find a verdict for the creditor or creditors,
48 the court do render judgment that the debtor be continued in custody until he be thence delivered by due course of law; that if within twenty days after filing the declaration of the debtor, no creditor do file a plea to the same, the clerk of the court, on the application of the debtor, is hereby required to enter in the minutes of the said court a certificate that no plea has been filed by any creditor to the declaration of the debtor, and that the debtor may produce a copy of the said certificate, under the hand of the clerk and seal of the court to any two judges of the court who, being together, are hereby empowered to make their joint order in writing under their hands and seals, that the debtor, for default of a plea filed to his declaration by any creditor, be discharged out of custody, according to the force, form, and effect of the said act, which order is to be delivered to the clerk of the court, and by him to be entered on the minutes of the said court, and to be filed, and if on the trial before the court and jury, and a verdict and judgment thereupon, the debtor shall be convicted, he shall pay such costs as may be taxed by the court, and if the creditor or creditors shall not maintain the issue on his or their parts, the said creditor or creditors shall in such case pay the costs by the court to be taxed.

10. If it shall appear to the satisfaction of any court before which an application shall be made for the benefit of the insolvent laws, or by the verdict of a jury if demanded by the debtor, that the debtor or debtors so applying has or have concealed or kept back any part of his or their estate or property or made any conveyance, deed, mortgage, judgment, sale, transfer, assignment, or other disposition of his or their estate, real, personal, or mixed, with intent to defraud his or their creditor or creditors, then and in

either of these cases the said debtor or debtors shall be refused his or their discharge, and it shall be lawful for such court to remand him or them to prison, there to remain in close confinement until discharged by due course of law.

11. The assignee or assignees so to be appointed as aforesaid are hereby declared to be invested with as lawful title to all lands, goods, debts, and effects whatsoever so assigned as the assignee himself had, and no release of the assignor, his executor, or administrator, or any trustee for him subsequent to such assignment, shall bar the assignee or assignees from recovering any debts or other property mentioned in the assignment to them made, and the assignee or assignees, after paying the fees of the jail keeper, shall divide the proceeds of the property so assigned to them among all the creditors in proportion to their respective debts, reserving to themselves such compensation for their services as is hereinafter allowed them.

12. Such assignee or assignees shall have full power and authority to dispose of all estates which shall be assigned to them, or which ought by virtue of this act to be assigned to them, to execute good and sufficient deeds for the same, to redeem all mortgages and additional contracts, and to recover in their own names everything belonging or appertaining to the estate, real and personal, of such debtor, and shall have full power and authority to refer to arbitration, settle, compound, and agree with any person or persons indebted to such insolvent in such manner as shall from time to time be agreed upon between them, and shall proceed to convert the estate of every such debtor into money as soon as conveniently may be and upon such credit as the major part in value of the creditors shall direct, and shall within the space of eighteen months proceed to make a division of all the money which shall come to their hands of all the estate aforesaid, first giving three months' notice of the time and place of making such dividend by advertising the same in one or more of the public newspapers in this State nearest the place of said debtor's confinement, and fixing advertisements in five of the most public places of the county, and if the whole be not then distributed shall within the space of one year thereafter make a second division of what moneys may come to their hands after the first division, and so from year to year till a final settlement thereof and a just and equal distribution of the whole estate be made; and in case any creditor or creditors of any such debtor shall reside in any other of the United States, and the circumstances of the case require in the opinion of the court a more extended publication, then such assignee shall, before the making of such dividend, give such further notice of the time and place of making the same as the court shall direct.

13. The assignee or assignees shall, at least one month before a division is made, appoint the day, by public notice as hereinbefore is directed, for a general meeting of all such creditors as shall choose to attend, and examine and ascertain the debts due to each creditor, and in case of any controversy relating to such debts it shall be determined in the following manner: The assignee or assignees shall nominate two arbitrators not being creditors of the insolvent, and the creditor whose debt is in controversy shall nominate two others and their names shall be separately written on four pieces of paper as nearly of the same size as possible, which shall be

rolled up in the same manner and put into a covered box, and from thence one of the assignees shall draw out three of the said pieces of paper, and the persons whose names are so drawn shall finally settle such controversy; and if any arbitrator so appointed shall refuse or be incapable of acting in a reasonable time, a new choice shall be made in the same manner, and in case any such creditor shall refuse to nominate arbitrators on his part, the assignees shall nominate them for him.

14. The assignee or assignees shall immediately after the assignment take an oath or affirmation, as the case may require, to be administered by the judges aforesaid, to the following effect, viz: I, A B, do solemnly swear that I will well and faithfully manage the insolvent's estate, and keep and render a true account of all that shall come to my hands of the same. So help me God. Which oath or affirmation shall be in writing, subscribed by the assignee or assignees, and filed with the clerk of the said court,
51 and the said assignees shall keep regular books of account, to which every creditor shall at all reasonable times have recourse, and for the care and trouble incumbent on the assignees they shall be allowed out of the insolvent's estate such sum as the court may deem adequate to their services and expenses.

15. For the more full discovery of the estate and effects of such debtor the court or judges as aforesaid, at the request of the assignee or assignees, shall have full power and are hereby required to summon and examine, on oath or affirmation as aforesaid, the wife of such debtor, and every other person whatsoever known or supposed to retain any part of the said debtor's estate or effects, or to be indebted to it, and in case any person on such summons shall refuse to attend, having no reasonable excuse, or shall refuse to be sworn or affirmed, then it shall or may be lawful for the said court or judges to commit such person so refusing to jail till he or she shall submit to be examined concerning what he or she knows relating to such insolvent's estate or effects.

16. The wife of such debtor and every person whatsoever summoned as aforesaid, shall be examined on interrogatories in writing, which interrogatories, with the several answers thereto, shall be signed by the person so examined and filed with the clerk of such court as shall award the debtor's discharge.

17. No suit in equity shall be commenced by any assignee or assignees without the consent of the major part of the creditors, in value, at a meeting to be held for that purpose, and if any creditor shall neglect or refuse to give notice of and to his or her debt within eighteen months after the assignment, or a division of the whole estate be made, such creditor shall not be entitled to a dividend, and all the money arising from the sale of the said debtor's estate shall be divided among the other creditors, but in case the whole of said debtor's estate shall not be divided and set-
52 tled by the time herein appointed for the first division, and such creditor shall prove his debt before the time appointed for a second division, then such creditor shall, before a second division be made among the other creditors, have his first dividend, but no creditor shall be admitted to prove his debt in order to entitle himself to a share in the insolvent's estate after the second division, but shall by this act be debarred from any share thereof.

18. Every such debtor who shall, before the delivery of the petition be-

fore directed, have become bail in any case on account of which he hath reason to think judgment may be had against him, and shall make oath or affirmation as aforesaid that at the time he so became bail he esteemed himself vested with an estate sufficient to answer any demand that could with any probability be made upon him as bail, may add to the accounts of the creditors, and the moneys owing by him, before directed to be given, an account of the manner of his becoming bail, and annex such a sum as he imagines he will be liable to pay on that account, and then the assignee or assignees shall reserve in his or their hands, for the space of eighteen months, such a dividend as a creditor for a like sum would have a right to receive, and after judgment obtained against any such debtor, the person obtaining the same shall be considered in every respect as another creditor whose debt was due before the delivery of the petition, but if in the space of eighteen months after the petition is delivered no judgment shall be obtained against the insolvent, the moneys so reserved shall be divided among the other creditors in the same manner as if the sum so annexed to the account of his creditors was paid; if judgment should be obtained against such debtor as bail for any sum within eighteen months after the petition is delivered, and after the division of his or her effects among his or her creditors, and the said debtor shall have omitted either wholly or in part to annex the said sum to the account delivered, the person obtaining such judgment shall recover against the said debtor either for the whole or the part omitted, as the case may be, so much as the other creditors of the said debtor ought to have received for the like just debt, and no more.

53 19. All other persons who have given credit to such insolvent debtor on a valuable consideration for any sum of money or other matter or thing, which is or may not be due or payable at or before the time of the delivery of the petition, shall and may be admitted and considered as creditors whose debts are then due, and shall receive a dividend in the same proportion as the other creditors, deducting thereout only a rebate of lawful interest for what shall be received on such debt, to be computed from the actual payment thereof to the time it would have become due.

20. Every such insolvent debtor, having given up all his or her estate, and conformed in all things to the directions of this act, shall forever thereafter be discharged from all debts due at the time of the assignment, or contracted for before that time, though payable afterwards, so far as regards the imprisonment of his or her person.

21. In case any such debtor shall, after the assignment of his or her estate, receive any debt or debts due to him or her before, or shall secrete any part of his or her estate, or any book or writings relating thereto, with an intent to defraud his or her creditors, he shall, on being thereof convicted on indictment, be adjudged guilty of wilful and corrupt perjury, and suffer accordingly, and shall be totally precluded from all benefit and advantage whatever which he or she might otherwise be entitled to.

22. In proceedings under this act the officers and persons in this section named shall be entitled to demand and receive of each insolvent debtor for the services hereinafter mentioned the following and no other fees:

Clerk, filing and reading petition and schedule	$0 18
Administering every oath or affirmation	0 08
Drawing up assignment and discharge	0 50
Filing and recording the same	0 48
Certificate under seal of office	0 25
The court hearing the application	1 30
Crier, for fees	0 10

54 23. The courts of common pleas are hereby respectively empowered and required to mark and lay out the bounds and rules of the prisons in their several counties adjoining such prison, so as to embrace the whole of the city, town, village, or borough in which the prison shall be, and shall cause the external or boundary lines of such limits to be marked on a map, which marks and bounds shall be recorded by the clerk of the said court, and may be altered or renewed from time to time as occasion may require, and every prisoner in any civil action giving bond to the sheriff with sufficient sureties, being freeholders and residents in the county, in double the sum for which he is committed, and that he will keep within the said bounds, shall have liberty to walk therein; and if the said bond shall be forfeited, the sheriff, at the request of the plaintiff or his attorney, shall assign such bond to the plaintiff by endorsing the same and attesting it under his hand and seal, in the presence of two or more witnesses, and the said plaintiff may bring an action thereon in his own name.

24. If any person who may enter into bond to keep the prison limits, in pursuance of the preceding section of this act, shall voluntarily and intentionally walk or go out of and beyond the prison limits that have been or shall hereafter be prescribed by virtue of this act, such voluntary and intentional walking or going out of or beyond the said prison limits shall be deemed and taken to be an absolute forfeiture of such bond, and the sheriff to whom such bond may have been given, or the plaintiff or plaintiffs at whose suit the prisoner may be in custody, in case such bond shall have been assigned to him, shall and may maintain an action on the said bond, notwithstanding the prisoner may have returned to and within the said prison limits before the commencement of such action, any law, usage, or custom to the contrary notwithstanding.

III. That on the 3d day of February, in the year one thousand
55 eight hundred and seventy-six, Wilhelm Pickhardt and Adolf Kuttroff recovered judgment in the supreme court in the city and county of New York against the said William H. Locke for the sum of three thousand and eighty-six dollars and eighty-five cents, which said judgment was duly docketed in the office of the clerk of the city and county of New York on the said 3d day of February, 1876, and that said judgment and every part thereof remains due and unsatisfied. That afterwards, and on the 10th February, 1876, execution was issued on said judgment to the sheriff of the city and county of New York, directing him to satisfy said judgment out of the personal property of said debtor, and if sufficient personal property of such debtor could not be found, out of the real property belonging to him, the said debtor, on the day when the said judgment was docketed in the said county, or at any time thereafter; and that afterwards, and on the 12th day of May, 1876, the said sheriff returned said execution to the office of the said clerk of the city and county

of New York wholly unsatisfied, and that at the time of the recovery of such judgment, and the issuing and return of said execution, the said William H. Locke did not reside nor did he have a place of business in this State, but was at the time and times aforesaid a resident of the State of New Jersey.

IV. That afterwards, and on or about the 23d day of April, 1876, certain proceedings supplementary to the return of said execution unsatisfied were instituted against the said William H. Locke on said judgment, under and pursuant to section 292 of the code of procedure; and that the said William H. Locke was examined therein before one of the judges of the supreme court, at the city and county of New York, and on the 27th day of May, 1876, at the said city of New York, upon the application of the said Wilhelm Pickhardt and Adolph Kuttroff, the judgment creditors of the said William H. Locke in said supplementary proceedings, the plaintiff was, by consent of the parties, and by an order of the
56 honorable Charles Donohue, one of the justices of the supreme court, at a special term of said court, duly appointed receiver of the property of the said William H. Locke, and the said order was, on the 6th day of June, 1876, filed and recorded in the office of the clerk of the city and county of New York, and on the said 7th June, 1876, a certified copy of said last mentioned order was delivered to the plaintiff as such receiver; that afterwards, and on the 7th day of June, 1876, the plaintiff as such receiver, under and pursuant to the said order appointing him such receiver, caused to be executed a bond with two sureties to the people of the State of New York, in the penalty of twenty-five hundred dollars, conditioned that if the plaintiff as such receiver should faithfully discharge the duties of the trust as such receiver then said application to be void, otherwise to be in full force and effect; which said bond was, on the said 7th day of June, 1876, duly approved by honorable Charles Donohue, one of the justices of the said court, and on the same day the said bond was filed in the office of the clerk of the city and county of New York.

V. That on or about the 23d day of September, in the year one thousand eight hundred and seventy-five, the said defendant William H. Locke, then being a resident of the State of New Jersey, in conformity to the requirement of the act of the legislature of that State mentioned in the first finding of fact herein, made and delivered to the defendants William King, John M. Goetchius, and Edward E. Poor, all doing business in the city of New York, an assignment of all his property for the alleged benefit of his creditors, a copy of which is set forth in the complaint in this action; that the said William H. Locke annexed to said assignment an inventory under oath of his estate, real and personal, according to the best of his knowledge, and that a copy of said inventory is annexed to the answer of the defendants William King, John M. Goetchius, and Edward E. Poor; that the said defendant William H. Locke also annexed to said assignment a list of his creditors and the amount of their
57 respective claims. That said assignment was executed and delivered by the defendant Locke, and accepted by the other defendants in good faith and without any intent to hinder, delay, or defraud the creditors of the said Locke or any of them, and with the intent bona fide to make an equal distribution of the proceeds of the assigned estate among the creditors of said Locke, in conformity of the requirements of the act of the legislature above mentioned.

VI. That the defendants William King, John M. Goetchius, and Edward E. Poor accepted the trusts reposed in them by said assignment, and as such assignees published for three weeks notices in two newspapers printed in the State of New Jersey, and circulated in the neighborhood where the said defendant William H. Locke resided, making known thereby that said assignment had been made, and that said creditors should present their claims under oath or affirmation, and that said defendants as such assignees did forthwith submit to the circuit court of the county of Passaic, in the State of New Jersey, a true inventory of the value of said assigned estate, and that said defendants, as such assignees, did enter into a bond of double the amount of the inventory, and that said bond and inventory were duly filed in the office of the clerk of said circuit court in the county of Passaic, all of which several acts of the said assignees above mentioned were under and pursuant to and in conformity with the provisions of the said act of the legislature of the State of New Jersey relating to the same.

VII. That the indebtedness on which the said Wilhelm Pickhardt and Adolph Kuttroff recovered their said judgment against the said defendant William H. Locke arose and accrued before the making of said assignment by him and in the city of New York, where the said Wilhelm Pickhardt and Adolf Kuttroff both at that time resided.

VIII. That the said Wilhelm Pickhardt and Adolf Kutroff have not, nor has either of them, nor any one for them, exhibited their said
58 claim, demand, and judgment, either in regard to the person of such debtor or to any estate, real or personal, not assigned as aforesaid or otherwise.

IX. No proceedings in bankruptcy have ever been taken against the defendant Locke.

X. The judgment creditors, Pickhardt and Kutroff, caused this action to be commenced on the 9th day of June, 1876.

XI. All the assigned property which came into the hands of the assignees under said assignment was in the State of New Jersey and was converted by the assignees into money in that State, and afterwards the money being the proceeds of the assigned property was for convenience of the assignees deposited in a bank in New York City, as the assignees or some of them had a place of business there.

XII. That the said defendants William King, John M. Goetchius, and Edward E. Poor, as such assignees, have collected and received out of said assigned property and have now in their possession a sufficient amount of money to pay the judgment herein mentioned and all the costs of the proceedings thereon in this action.

And I find as conclusions of law:

I. That the said act of the legislature of the State of New Jersey under which said assignment was executed is an insolvent law, and as such is suspended and of no effect by operation of the Revised Statutes of the United States, title "Bankruptcy," and under an act of Congress of the United States entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and for other purposes,'" approved June 22, 1874, and that said assignment so executed by the de-

fendant William H. Locke to the defendants William King, John
59 M. Goetchius, and Edward E. Poor is by reason thereof void and of no effect as against the plaintiff in this action.

II. That the plaintiff, as such receiver, have judgment against the defendants.

III. That the defendants William King, John M. Goetchius, and Edward E. Poor, as assignees of the said William H. Locke, pay to the plaintiff, Thomas Boese, as such receiver, the sum of three thousand and eighty-six dollars and eighty-five cents, with interest thereon from the 3d February, 1876, together with the plaintiff's costs in this action to be taxed, and that said plaintiff have an allowance of five per cent. on said judgment and interest, for which amount judgment shall be entered against said defendants, and that the said defendants also pay to the plaintiff, as such receiver, the amount of his fees and commissions as may hereafter be allowed by the court.

IV. That the defendants William King, John M. Goetchius, and Edward E. Poor be and they are severally restrained and enjoined from parting with or in any manner disposing of the moneys and property which have come into their hands or under their control as such assignees until the further order of this court.

C. H. VAN BRUNT.

60 At a special term of the supreme court, held at the New York County court-house, in the city of New York, on the first Monday of June, 1877.

Present, Hon. Chas. H. Van Brunt, judge.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM H. LOCKE AND WILLIAM KING, John M. Goetchius, and Edward E. Poor, assignees of said William H. Locke.

The above action having been brought to trial before me on the twenty-third day of March, 1877, at a special term of this court, and after hearing the testimony of the respective parties, and C. Bainbridge Smith, of counsel for the plaintiff, and Martin & Smith, of counsel for the defendants, I found the following facts and conclusions of law:

(Said findings of fact and conclusions of law are printed at folio 78 to folio 169 of this case.)

Now, on motion of C. Bainbridge Smith, attorney for the plaintiff—

It is ordered, adjudged, and decreed that the plaintiff, Thomas Boese, as receiver of the property of William H. Locke, recover judgment against the defendants.

It is also ordered, adjudged, and decreed that the said plaintiff recover judgment against the said defendants William King, John M.
61 Goetchius, and Edward E. Poor, assignees of the said William H. Locke, for the sum of three thousand and eighty-six dollars and eighty-five cents, with interest thereon from the 3rd day of February, 1876, with his costs and allowance which have been taxed and adjusted at the

sum of three hundred and fifty-six dollars, and which several sums amount together to three thousand seven hundred and thirty-one $\frac{14}{100}$ dollars, for which the plaintiff have execution against the defendants.

And it is also ordered, adjudged, and decreed that the said defendants also pay to the plaintiff, as such receiver, the amount of his fees and commissions as may hereafter be allowed by the court.

And it is also ordered that the said defendants William King, John M. Goetchius, and Edward E. Poor, be, and they are severally, enjoined and restrained from parting with, or in any manner disposing of, the moneys and property which have come into their hands or under their control, as such assignees, until the further order of this court.

C. H. B.

Entered.

Case and exceptions on the part of the defendants, King, Goetchius, & Poor, as assignees, &c.

Supreme court.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke, plaintiff,
against
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius, and Edward E. Poor, as assignees of the property and effects of William H. Locke, defendants.

This action was commenced by Thomas Boese, as receiver of the property of William H. Locke, against the defendants above-named on the 9th day of June, 1876.

The defendants King, Goetchius, and Poor, as assignees, &c., appeared by Martin & Smith, as their attorneys, and answered the complaint on the 20th day of September, 1876.

The defendant Locke appeared by Arnold, Elliott & White, as his attorneys, and also answered the said complaint on the 19th day of September, 1876.

The pleadings appear in the judgment roll.

The names of the original parties to this action appear in full in the above title, no change of parties having taken place pending the suit.

The action came on to be tried before his honor Mr. Justice Van
62 Brunt at a special term of this court without a jury, held at the county court-house, in the city of New York, on the 23d day of March, 1877, at which time and place testimony having been produced on the part of the plaintiffs and on the part of the defendants, the said defendants King, Goetchius, and Poor, requested the court, among other things, to find and decide as matters of law:

First. That the assignment, a copy whereof is set forth in the complaint, was, and is, on its face, a common-law assignment made by the defendant Locke "for the purpose of securing to his creditors an equal distribution of his estate." The court refused so to find, and to such refusal the said defendants duly excepted.

Second. That if the provisions of the Revised Statutes of the United States, title "Bankruptcy," and if the act of Congress of the United States entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867, and for other purposes," approved June 22, 1874, have any effect upon the act of the legislature of the State of New Jersey, entitled "An act to secure to creditors an equal and just distribution of the estates of debtors who convey to assignees for the benefit of creditors," passed April 16, 1846, and mentioned in said complaint, such effect must be limited to the 14th section of said act as being the only portion thereof which can be deemed as in any respect in conflict with the provisions of the said Revised Statutes, or with the provisions of said act of Congress. The court refused so to find, and to such refusal the said defendants duly excepted.

Third. That if the provisions of the said Revised Statutes and of said act of Congress suspended and superseded the operation of any part of the said act of the legislature of the State of New Jersey, said last-mentioned act is suspended and superseded only so far as the same is in conflict with the said Revised Statutes and act of Congress. The court refused so to find, and to such refusal the said defendants duly excepted.

63 Fourth. That said assignment was valid and effectual by the laws of the State of New Jersey, and being so valid it operated as an assignment of the property of the assignor in this State and of the proceeds of such property therein. The court refused so to find, and to such refusal the said defendants duly excepted.

Fifth. That the defendants King, Goetchius, and Poor, as assignees of the defendant Locke, can hold the assigned property and its proceeds as against the creditors of the assignor, the defendant Locke. The court refused so to find, and to such refusal the said defendants duly excepted.

Sixth. That no proceedings in bankruptcy having ever been instituted against the defendant Locke, and no assignee in bankruptcy of the said defendant Locke having ever been appointed, and the limitation prescribed by said Revised Statutes and by said act of Congress for bringing an action to set aside said assignment having expired before the commencement of this action, there is no ground for adjudging said assignment void as against the plaintiffs. The court refused so to decide, and to such refusal the said defendants duly excepted.

Seventh. That there is no ground for adjudging the said assignment void as against the creditors of the said defendant Locke. The court refused so to find, and to such refusal the said defendants duly excepted.

The judge thereafter made the several findings of fact and of law which appear in the judgment roll at pages 23 to 45, and in settling this case he hereby specifies the same as the facts found by him and his conclusions of law.

After the filing of the decision of the said justice, and on the 9th day of June, 1877, the said defendants King, Goetchius, & Poor, duly filed in the office of the clerk of this court, and served on the attorney for the plaintiff herein, exceptions as follows:

64 Supreme court.

THOMAS BOESE AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius and Edward E. Poor, assignees of said Locke.

The defendants William King, John M. Goetchius, and Edward E. Poor, assignees of William H. Locke, hereby except to the findings and decision of the court in this action, as follows:

First. For that the said court has found and decided as a conclusion of law, that the act of the legislature of the State of New Jersey, passed April 16th, 1846, entitled:

"An act to secure to creditors an equal and just distribution of the estates of debtors who convey to assignees for the benefit of creditors," mentioned and referred to in the pleadings herein, is an insolvent law, and as such is suspended and of no effect, by operation of the Revised Statutes of the United States, title "Bankruptcy," and under an act of Congress of the United States, entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and for other purposes,'" approved June 22, 1874.

Second. For that the said court has found and decided as a con-
65 clusion of law, that, by reason of such suspension of said act of the legislature of the State of New Jersey, the assignment executed by the defendant William H. Locke to the defendants William King, John M. Goetchius, and Edward E. Poor, is void and of no effect as against the plaintiff in this action.

Third. For that the said court has found and decided as a conclusion of law that plaintiff, as receiver, is entitled to have judgment against the defendants.

Fourth. For that the said court has found, decided, and adjudged as a conclusion of law that said defendants William King, John M. Goetchius, and Edward E. Poor, as assignees of the said defendant William H. Locke, pay to the plaintiff, as such receiver, the sum of $3,086.85, with interest thereon from the third day of February, 1876, together with plaintiff's costs in this action.

Fifth. For that the said court has found and decided as a conclusion of law that said plaintiff have an allowance of five per cent. on said judgment for $3,086.85, with interest from the third day of February, 1876, together with plaintiff's costs in this action.

Sixth. For that the said court has found and decided as a conclusion of law that judgment be entered against the defendants King, Goetchius, and Poor, as assignees of said defendant Locke, for said sum of $3,086.85, with interest thereon from the third of February, 1876, together with the plaintiff's costs herein and said allowance of five per cent..

Seventh. For that the said court has found and decided as a conclusion of law that the said defendants King, Goetchius, and Poor, as such

assignees, also pay to the plaintiff, as such receiver, the amount of his fees and commissions which may be hereafter allowed by the court.

Eighth. For that the said court has found and decided as a conclusion of law that said defendants William King, John M. Goetchius, and Edward E. Poor be restrained and enjoined from parting with or in
66 any manner disposing of the money and property in their hands as such assignees until the further order of the court.

Ninth. For that the said court, though duly requested, has refused to find as a conclusion of law that said assignment is, on its face, a common-law assignment, made by the defendant Locke "for the purpose of securing to his creditors an equal distribution of his estate."

Tenth. For that the said court has not found and decided as a conclusion of law that if the said Revised Statutes of the United States, title "Bankruptcy," and if the said act of Congress hereinbefore mentioned and referred to have any effect upon the said act of the legislature of the State of New Jersey hereinbefore referred to, such effect must be limited to the 14th section of said act, as being the only portion thereof which can be deemed as in any respect in conflict with the provisions of the Revised Statutes of the United States or with the provisions of said act of Congress.

Eleventh. For that the said court has not found and decided as a conclusion of law that if the said provisions of the Revised Statutes of the United States and of the said act of Congress of the United States hereinbefore mentioned, suspend and supersede the operation of any part of said act of the legislature of the State of New Jersey, said last-mentioned act is superseded only so far as the same is in conflict with the Revised Statutes and act of Congress.

Twelfth. For that the said court has not found and decided as a conclusion of law that said assignment was valid and effectual by the laws of the State of New Jersey, and, being so valid, it operated as an assignment of the property of the assignor in this State, and of the proceeds of such property therein; and for that the said court has not found and decided as a conclusion of law that the defendants King, Goetchius, and Poor, as such assignees, can hold said assigned property and its proceeds as against the creditors of said assignor, the defendant Locke.

67 Thirteenth. For that the said court has not found and decided as a conclusion of law that no proceedings in bankruptcy having ever been instituted against the defendant Locke, and no assignee in bankruptcy having ever been appointed, and the limitation prescribed by said act of Congress and said provisions of the Revised Statutes of the United States for bringing an action to set aside said assignment having expired before the commencement of this action, there is no ground for adjudging the said assignment void as against the plaintiff, or the creditors of said defendant Locke.

Dated New York, June 9, 1877.

MARTIN & SMITH,
Att'ys for Def't King and others.

N. Y. supreme court, special term, March, 1877.

THOMAS BOESE, RECEIVER, &c.,
against
WILLIAM KING AND OTHERS, ASSIGNEES, &c.

Statement of facts.

On the third of February, 1876, William Pickhardt and Adolph Kutroff recovered a judgment in the supreme court of this State against the defendant Locke, and such proceedings were thereupon had under such judgment that the plaintiff was appointed receiver of the property of the judgment debtor, and duly qualified as such.

On the 23d of September, 1875, the defendant Locke, then being a resident of the State of New Jersey, made an assignment for the benefit of his creditors to the defendants King, Goetchius, and Poor, who ac-
68 cepted the trust reposed in them by said assignment and reduced to cash the property of the said Locke, and the said assignees have brought certain of said moneys into the State of New York and deposited the same in a trust company here.

The plaintiff has brought this action to have said assignment declared fraudulent and void, and to have the property which the defendants have in this State belonging to said Locke delivered over to the plaintiff as receiver.

Mr. C. BAINBRIDGE SMITH,
Of Counsel for Plaintiff.
Mr. A. P. WHITEHEAD,
Of Counsel for Defendants.

VAN BRUNT, *J.:*

The defendants claim that this action cannot succeed, upon two grounds:

First. That the law of the State of New Jersey, pursuant to which this assignment purports to have been made, is in full force; and

Secondly. That if the above-mentioned act has been repealed by the United States bankrupt law, the assignment is a good one at common law.

It has been held by the United States Supreme Court that the bankrupt law has abolished all insolvent laws of the several States; that is, that no debtor against the will of his creditor can be relieved of his debts except in the manner prescribed by the bankrupt law.

The first question therefore to consider is, whether or not the statute of New Jersey, under which this assignment is made, is to be considered in any respect as an insolvent law.

69 This act was passed on the 16th of April, 1846, and was entitled "An act to secure to creditors an equal and just distribution of the estates of debtors who convey to assignees for the benefit of creditors."

Section I of that act provides "that every such conveyance shall be made for the equal benefit of the creditors," and prohibits all preferences.

Section II requires the debtor to annex a schedule of assets and liabilities.

Section III requires the assignee to give three months' notice, by publication in the newspapers, to creditors to present their claims.

Section V provides that, at the expiration of three months the assignee shall file a list of creditors and of their respective claims, and also provides that all claims against the estate must be made as prescribed by that act or be forever barred from coming in for a dividend.

Section XI provides that if any creditor shall not exhibit his claim within the term of three months above mentioned, such claim shall be barred of a dividend unless the estate shall prove sufficient to pay the claims which have been presented in full, &c.

Section XIV provides that nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims, * * * but with respect to the creditors who shall come in and exhibit their demands for a dividend, they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors or their representatives.

In the case of Mayer v. Hellman, 1 Otto, 496, the Supreme Court of the United States, referring to a statute of the State of Ohio for the purpose of showing that the statute is not repugnant to the bankrupt law, used the following language:

70 "There is nothing in the act resembling the insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for the enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision."

The court, by this language, clearly intimate that if an act by any of its provisions exempts the insolvent from arrest or imprisonment, or relieves his after-acquired property from liability to any of his creditors, it is in its nature an insolvent law, and repugnant to the bankrupt law.

The statute of New Jersey under consideration, by its fourteenth section, expressly provides that all creditors who shall exhibit their claims to the assignee for a dividend, no matter how small such a dividend may be, shall be wholly barred from any action or suit at law or equity against such debtor, or their representatives, thus clearly exempting the insolvent from arrest or imprisonment, and exempting his after-acquired property from liability to such creditors. These provisions clearly make the act in its nature an insolvent law, and consequently repugnant to the bankrupt law.

This brings us to the second proposition urged by the defendants, viz: That even if the above-mentioned act has been suspended by the bankrupt law, the assignment is a good one at the common law.

The assignment provides that the trustees are to take possession of, and collect and to sell and dispose of, the same (meaning the property of the assignors) at public or private sale, and to distribute the proceeds to and among the creditors of said William H. Locke in proportion to their several just demands, pursuant to the statute in such case made and provided.

The assignment, therefore, clearly appears to have been made subject to and in reference to the laws of New Jersey respecting such instruments.

71 The assignees are to distribute the fund according to the laws of

New Jersey, and they would violate the provisions of the trust deed did they make a distribution without complying with the provisions of those laws, and it seems to me a necessary consequence that the assignor undoubtedly presumed that he would be entitled to the protection provided for by the statute pursuant to the provisions of which his assigned estate was to be distributed.

If this view is correct the assignment cannot be sustained as a common-law assignment, but must be considered as having been made under a statute of New Jersey the operation of which has been suspended by the bankrupt law.

In the consideration of these questions I have not thought it necessary to consider what would have been the effect of the assignment had it not been void because of the bankrupt law.

For the reasons above stated the assignment is void and confers no title upon the assignees to the property of the defendant Locke.

The plaintiff is entitled to judgment, with costs.

72 Supreme court, county of New York.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of WILLIAM H. LOCKE,
against
WILLIAM H. LOCKE, IMPLEADED WITH OTHERS.

Please take notice that the defendant William H. Locke hereby appeals to the general term of this court from the judgment entered in this action on the 4th day of June, 1877, and from each and every part of said judgment.

Dated New York, July 5th, 1877.

Yours, &c.,

ARNOLD, ELLIOTT & WHITE,
Att'ys for Def't Wm. H. Locke.

To C. BAINBRIDGE SMITH, Esq.,
Attorney for Plaintiff.
HENRY A. GUMBLETON, Esq.,
Clerk of the City and County of New York.

73 At a general term of the supreme court, first judicial department, held at the county court-house, in the city of New York, on the 28th day of March, 1879.

Present, Hon. Noah Davis, P. J.; John R. Brady, Charles R. Ingalls, J. J.

THOMAS BOESE, AS RECEIVER, &C., RESP'D'T,
ag'st
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. GOETCHIUS, and EDWARD E. POOR, assignees, &c., app'l'ts.

The appeal from the judgment in this action coming on to be heard in its regular order on the calendar of this court, now, after hearing Michael

W. Divine, of counsel for appellants, and C. Bainbridge Smith, of counsel for respondent, and due deliberation being had thereon, it is—

Ordered that the judgment appealed from be and the same is hereby affirmed with costs to the respondent against the appellants.

A copy.

HUBERT O. THOMPSON, *Clerk.*

74 *Judgment of affirmance, April 1st, 1879.*

Supreme court, city and county of New York.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke, respondent,
ag'st
WILLIAM H. LOCKE AND WILLIAM KING, JOHN M. Goetchius, & Edward E. Poor, assignees, &c., appellants.

The appeal from the judgment entered on the decision of the Hon. Chas. H. Van Brunt, on the 4th day of June, 1877, in favor of the plaintiff and against the defendants, coming on to be heard, and after hearing M. W. Divine, of counsel for the defendants and appellants, and C. Bainbridge Smith, of counsel for the plaintiff and respondent, and the said judgment having been in all things affirmed with costs, and the costs having been adjusted by the clerk of this court at the sum of one hundred and thirty $\frac{69}{100}$ dollars: Now, on motion of C. Bainbridge Smith, attorney for the plaintiff, it is ordered, adjudged, and decreed that the judgment entered in this action on the 4th day of June, 1877, be and the same is hereby in all things affirmed, and the plaintiff do recover of the defendants William H. Locke, William King, John M. Goetchius, and Edward E. Poor the sum of one hundred and thirty dollars and sixty-nine cents, and that the plaintiff have execution therefor against the defendants.

75 Supreme court.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
ag'st
WILLIAM KING, JOHN M. GOETCHIUS, & EDWARD E. Poor, as assignees of the property and effects of William H. Locke, impleaded with William H. Locke.

GENTLEMEN: Please take notice that William King, John M. Goetchius, and Edward E. Poor, as assignees, &c., defendants above named, hereby appeal to the court of appeals of the State of New York from the judgment of the general term of this court entered herein on the first day of April, 1879, in the office of the clerk of the city and county of New York, in favor of the plaintiff and against the defendants, for the sum of one hundred and thirty $\frac{69}{100}$ dollars costs and disbursements, and affirming the judgment entered herein on the 4th day of June, 1877, in

favor of said plaintiff and against the defendants for the sum of $3,731.14, and from each and every part of said judgment.

Dated New York, April 8th, 1879.

MARTIN & SMITH,
Attorneys for Def'ts and App'l'ts King, Goetchius, and Poor, as Assignees, &c.

To C. BAINBRIDGE SMITH, Esq.,
Plaintiff's Attorney.
HUBERT O. THOMPSON, Esq.,
Clerk of the City and County of New York.

76 New York supreme court, general term, first department. January, 1879. Noah Davis, P. J.; Brady and Ingalls, justices.

THOMAS BOESE, AS RECEIVER, RESPONDENT,
vs.
WILLIAM KING ET AL., IMPLEADED, ETC., APPELLANTS.

Appeal from a judgment rendered at special term declaring an assignment void.

M. W. Divine, for appellants; C. B. Smith, for respondent.

BRADY, *J.:*

On the 23rd September, 1875, the defendant Locke made and delivered to the other defendants an assignment of his property in trust, to take possession of and collect and to sell and dispose of the same at public or private sale in their discretion, and to distribute the proceeds to and among the creditors of the assignor in proportion to their several just demands, pursuant to the statute in such case made and provided. The defendant Locke was at the time of the assignment a resident of New Jersey, and the statute referred to in the clause quoted was one of that State passed April 16th, 1846, entitled "An act to secure the creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors." The statute provides, among numerous
77 other things, that if any creditor shall not exhibit his, her, or their claim within the term of three months after the time designated therefor such claim shall be barred of a dividend, unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditors shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom. Section 11. It also provides by section 14 that although nothing in the act shall be taken or understood as discharging the debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims, either in regard to the persons of such debtor, or to any estate, real or personal, not assigned, yet with respect to the creditors who shall come in under the assignment and exhibit their demands for a dividend they shall be wholly barred from having afterwards any action or suit at law or in equity against such debtor or their representatives, unless they shall prove fraud on the part of the debtor "with respect to the assignment, or concealing his estate, real or

personal, whether in possession, held in trust, or otherwise." It will be perceived on examination of these provisions that they are at utter variance with the effect of a common-law assignment for the benefit of creditors, either with or without preferences. In the first place, the assigned estate is given to the creditors who come in and prove their claims to the exclusion of the others, until the debts of the former class allowed are fully satisfied, unless a creditor who did not present his claim shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom. In the next place, it is declared that the creditors who shall come in under any assignment and exhibit their demands
78 for a dividend shall, as we have seen, be wholly barred from having any action, unless upon proof of fraud "with respect to the assignm nt, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise." The estate, is therefore, by the statute distributed among the creditors only who exhibit their claims for a dividend, and not generally, and upon those who receive the pro rata distribution the statute operates as a release and forever bars their remedy against the person and estate of the debtor or assignor. This is the condition upon which the creditor is paid his portion of the estate. These inhibitory and prohibitory provisions are not the characteristics of a common-law assignment for the benefit of creditors. Such an instrument must be absolute and unconditional, imposing no coercive terms upon creditors for the advantage of the assignor as the condition of receiving its benefits. Burrell on Assignment, 256, and numerous cases cited. The statutes relating to insolvency generally, and indeed uniformly, provide either for the exoneration of the debtor from imprisonment or from his debts on executing the assignment prescribed by the statute under which his application is made. No debtor could make a valid assignment at common law which would exact from the creditor a discharge, either relating to the person, property, or liability of the debtor, as a condition of receiving a portion only of his debt, and the statute under consideration, tested by that rule, cannot be regarded as other than an insolvent law by which persons unable to pay their debts can secure immunity from prosecution by such of their creditors as accept a stipened under a distribution of the assigned estate among creditors. No debtor would be allowed, either, to declare by way of assignment that unless his creditors presented their claims within a certain time his estate should be given to those who came in within the period limited and judged
79 by this test. The statute is an insolvent law, designed to accomplish what the debtor could not effect by any act of his own. In the elements of a prescribed period for the presentation of claims and the discharge provided for, the statute referred to assimilates to the insolvent laws of this State, and of the States of the Union in general. The statute in effect prohibits any assignment which is not to be followed by the results stated; it does not in express terms, but does by necessary implication; and accomplishes in that mode the prohibition. It declares that every assignment shall be made for the equal benefit of creditors, in proportion to their several demands to the net amount that shall come to the hands of the assignee for distribution, and prohibits preferences, and then provides what shall be done in relation to such assignments, including the provisions in the sections already stated and discussed. The effect is to

compel an assignment in a particular mode, and to arrange the distribution of the property assigned and the consequences of such distribution to debtor and creditor. It is true that no one is compelled to present his claim, but that does not at all affect the character of the statute; because the conditions of acceptance remain, and its coercive feature still exists. The question, then, springing from this view is whether the assignment is void as in contravention of the bankrupt law which suspended the insolvent laws of the several States. The assignment, it is found by the court below, was made in good faith and without any intent to hinder, delay, or defraud creditors, and with the intent bona fide to make an equal distribution of the proceeds of the assigned estate among the creditors of the assignor in conformity with the requirements of the legislature. It may be said, in addition, that it was made in the only mode allowed by law in New Jersey, where it was executed. The precise question
80 suggested has not been disposed of by the court of last resort in this State. It was held in Thrasher vs. Bentley, 59 N. Y. Rep., 649, that an assignment for the benefit of creditors by an insolvent debtor which gave no preferences, no proceedings in bankruptcy having been taken against him, was not void as in hostility to the bankrupt law, and this adjudication was a result declared, conceding the law of 1860 of our own State to be suspended by the bankrupt law and for the reason that an assignment for the benefit of creditors was not created by the act of 1860, but existed at common law.

The decision of the supreme court of Connecticut in Hawkins's appeal (see 34 Conn., 548) was approved. In the later case of Haas against O'Brien, 66 N. Y. Rep., 597, it was again declared that such an assignment, made in good faith, without intention to defeat the object, impair or impede the operation, or evade any of the provisions of the bankrupt act, and which transferred all of the insolvent's property without preference, was not a violation of the spirit and intent of said act, and was not void per se.

It was also held in that case that the validity of an assignment was not affected by the fact that proceedings in bankruptcy were taken against the assignor within six months, and that the bankrupt act was not intended to interfere with the action of a debtor who in good faith, without any fraudulent intent, voluntarily sought to apply his property to the payment of his debts in equal proportions, precisely as it would have been applied had proceedings been taken under that act. See also the latest case, Bostwick vs. Burnett, 18 Albany Journal, page 418, to same purport. In these cases the distinction between an insolvent act of the legislature per se and an act regulating, to some extent, a voluntary assignment for the benefit of creditors was not discussed;
81 indeed, was not at all considered. It was not necessary that it should be, because the sphere of such an instrument was not enlarged, and there was no new force or effect given to it by the statute which related to its form and execution merely and not to its effect. The question was not discussed or considered, either by the supreme court of Connecticut in Hawkin's appeal, supra, nor in the case of Malteie vs. Hotchkiss, 38 Conn., 80, but seems to have been considered and disposed of in the case of Geary's appeal, 43 Conn., 280, by a divided court, in which one of the judges concurred with hesitation in the judgment pro-

nounced, and from which two of them dissented. It was conceded that the question was a close one, by no means free from doubt and difficulty, and that there was a conflict of decisions upon the general subject of the effect of the bankrupt act in reference to acts of insolvency. In the case of Sheperdson's appeal, 36 Conn., 23, which was an appeal from a decree of a probate court, appointing a trustee in insolvency on the estate of the appellant in insolvent proceedings against him by his creditors under the insolvent law of the State, Park, J., stated in his dissenting opinion that if the debtor owed more than three hundred dollars (which was the lowest sum fixed for the application of the bankrupt act), the majority of the court conceded that the probate court had no jurisdiction of the case because the bankrupt act then applied and suspended the insolvent act in cases of involuntary insolvency.

The question discussed seems to have been more distinctly presented in that case than any of the other cases in Connecticut to which our attention was called. These adjudications are considered with more particularity, because they were more prominently relied upon, with the ex-
82 ception of the case of Meyer vs. Hellman, to which reference will be made, and were more prominently presented upon the argument than any other.

The writer of this opinion had occasion to examine a kindred question, and upon the consideration of the authorities, which were found to be conflicting, arrived at the conclusion that the power conferred upon Congress by the Constitution to establish a uniform system of bankruptcy throughout the United States, having been exercised by the enactment of a law for that purpose on the second of March, 1867, that law became paramount and exclusive, and suspended the operation of the insolvent laws of this State over all cases within its purview. (See Shears vs. Lollinger, 10 Abbott, N. S., and cases cited.) It was stated in the case just mentioned that the converse of these propositions, if declared, might lead to conflicts between the State and Federal authorities in the administration of their powers over the same subject-matter, in reference to which both had the right to legislate, and that the State law yielded therefore. In the case supra decided by our court of appeals, as already suggested, the distinction between an insolvent law per se and an act of insolvency voluntary on the part of the debtor, and controlled by the rules of the common law, was not discussed. In the case in the 10th Abbott supra the question was distinctly presented, because the debtor had obtained a discharge from his debts, under an insolvent law of this State, known as the "two-thirds act," and which provides for a voluntary application by an insolvent, aided by consent of his creditors, to the amount of two-thirds of his indebtedness, and the discharge obtained, in which not only as to them but as to the other third not assenting operates as a release
83 of the debts due. It may be here observed that the statute of Connecticut on the subject of voluntary assignments for the benefit of creditors does not contain provisions kindred to those found in the statute of New Jersey, to which reference has already been made, and by which the whole subject, namely, the assignment and the dispositions of the assigned assets, and the consequences are regulated and determined. The case of Meyer vs. Hellman, 1 Otto, 496, does not sustain the appellant's view. The assignment considered in that case was one made for

the benefit of creditors in the State of Ohio, and it appeared that there was a statute in that State regulating the mode administering assignments for the benefit of creditors.

It was held, however, that that statute did not in terms compel or even authorize assignments, but assumed that such instruments were conveyances previously known, and provided only a mode by which the trust should be executed. And further that there was nothing in the act resembling an insolvent law. It did not discharge the insolvent from arrest or imprisonment, and left his after acquired property to his creditors precisely as though no assignment had been made. It was said, indeed, that the provisions for enforcing the trust were such as a court of chancery would apply in the absence of any statutory provisions, and further that the assignment must be regarded as though the statute of Ohio had no existence. There is a wide difference, therefore, between the act of the legislature of New Jersey and that of Ohio, as we have seen.

There is no doubt, as suggested by the supreme court in Connecticut, that the subject discussed is not free from difficulty, and that there are
84 conflicts in the adjudications relating to it; but nevertheless, for the reasons assigned, the conclusion seems to be inevitable that an insolvent law created by act of the legislature, in regard to assignments for the benefit of creditors, such as the statute of New Jersey supra is in conflict with the bankrupt law of the United States; for these reasons the judgment must be affirmed.

I dissent.

N. D.

With some hesitation I concur.

C. R. I.

A copy.

LEWIS & BEECHER.

85 At a special term of the supreme court, held at chambers at the county court-house, in the city of New York, on the sixth day of April, 1880.

Present, honorable Charles Donohue, justice.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM KING, JOHN M. GOETCHIUS, AND Edward E. Poor, as assignees of the property and effects of William H. Locke, impleaded with William H. Locke.

The above-named defendants William King, John M. Goetchius, and Edward E. Poor, as assignees, &c., having appealed to the court of appeals from the judgment of the general term of the supreme court
86 entered herein on the first day of April, 1879, in favor of the plaintiff and against the defendants, for the sum of one hundred and thirty $\frac{69}{100}$ dollars, costs, and affirming the judgment of the special term entered herein on the 4th day of June, 1877, in favor of said plaint-

iff and against the defendants for the sum of $3,731.14, and said appeal
2 having been heard, and said court of appeals having, after due deliberation, ordered and adjudged that the judgment of the general term of the supreme court appealed from in this action be reversed and judgment rendered for the defendants, with costs, and the record remitted from said court of appeals being filed, now, on motion of Martin & Smith, attorneys for the defendants, William King, John M. Goetchius, and Edward E. Poor, assignees, &c.,

4 It is ordered, adjudged, and decreed that the said judgment of the court of appeals be, and the same hereby is, made the judgment of
D. S. this court.

87 Supreme court.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY of William H. Locke,
against
WILLIAM KING, JOHN M. GOETCHIUS, AND Edward E. Poor, as assignees of the property and effects of William H. Locke, impleaded with William H. Locke.

Judgment.—April 6, 1880.

The appeal of the above-named defendants, William King, John M. Goetchius, and Edward E. Poor, as assignees, &c., to the court of appeals from the judgment of the general term of this court, entered herein on the first day of April, 1879, in favor of the plaintiff and against the defendants, for the sum of one hundred and thirty $\frac{69}{100}$ dollars,
2 costs, and affirming the judgment of the special term, entered
88 herein on the 4th day of June, 1877, in favor of said plaintiff and against the defendants, for the sum of $3,731.14, having been heard, and said court of appeals having ordered and adjudged that the judgment of the general term of the supreme court appealed from in this action be reversed, and judgment rendered for the defendants with costs, and the record remitted from said court of appeals having been filed and
3 an order duly entered making the judgment of the court of appeals the judgment of this court, and defendants' costs having been duly taxed by the clerk of this court, now, on motion of Martin & Smith, attorneys for defendants, William King, John M. Goetchius, and Edward E. Poor, assignees, &c.,

It is adjudged that said judgment of the general term, entered herein on April 1, 1879, and said judgment of the special term, entered herein on June 4, 1877, be, and the same hereby are, reversed; and it is further adjudged that the defendants, William King, John M. Goetchius,
89 and Edward E. Poor, as assignees of the property and effects of
4 William H. Locke, have judgment upon the issues in this action against Thomas Boese, as receiver of the property of William H.
D. S. Locke, the plaintiff herein, and that said defendants recover of said plaintiff the sum of seven hundred and seventy-four dollars and ninety cents costs, as taxed, and that they have execution therefor.

90 Court of appeals.

THOMAS BOESE, AS RECEIVER, &C., RESPONDENT,
against
WILLIAM H. LOCKE & AL., APPELLANTS.

RAPALLO, *J.*

There is much force in the argument that the 14th section of the statute of New Jersey is in the nature of a bankrupt law. It enables a debtor to coerce his creditors to discharge him from his debts on receiving a rateable dividend of his existing assets, the only alternative being to relinquish or abandon all claims upon those assets.

Assuming, therefore, that this provision is in the nature of a bankrupt law, and that the exercise by Congress of the power to establish "uniform laws on the subject of bankruptcies throughout the United States" ipso facto suspended the operation of the provision above referred to,
91 the question arises whether the residue of the New Jersey statute was affected or whether it continued operative.

The object of the statute, as expressed in its title, was "to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors." It prohibits preferences, requires an inventory of the debtor's property, and a list of his creditors to be annexed, requires the assignee to give security for the faithful performance of his trust, and prescribes his duties in giving notice of the assignment, advertising for claims, declaring dividends, &c., &c.

To these provisions is superadded the 14th section, which relates wholly to the effect upon the creditor's claim of accepting a dividend. We are of opinion that there is no such necessary connection between this sec-
92 tion and the other provisions of the act as to require that they should fall because of that section becoming inoperative. The act does not create the right to make voluntary assignments, but is restrictive of a previously existing right to make them, and throws salutary safeguards around the exercise of that right, and in those respects is intended for the protection of creditors.

None of those provisions come in any way in conflict with the power conferred upon Congress, nor with the bankrupt law, and they are complete in themselves, and in no way dependent upon the 14th section, which attempts to provide for the discharge of the debtor from his debts. The 14th section is a distinct and independent provision for the benefit of the debtor. If this provision was suspended by the bankrupt law the consequence was that an insolvent debtor who, during the existence of that law, sought a discharge from his debts, must, for the purpose of attain-
93 ing that object, have recourse to proceedings in bankruptcy. But a debtor who sought simply to obtain an equal distribution of his property among his creditors was at liberty to do so by means of a voluntary assignment.

The right to make such assignments was not affected by the bankrupt law, but continued in full force as well in States where there were statutory regulations on the subject as in States where there were none.

Even if the whole of the New Jersey statute had been suspended, the right to make a voluntary assignment would still have existed; but we

do not think that there was any suspension, unless it be of the 14th section, and that after the passage of the bankrupt law a debtor making an assignment in New Jersey was still bound to observe the conditions imposed by that act. If the right to make the assignment had been
94 created by the act different considerations might enter into the question, and it might be argued that the 14th section was an essential part of the system and scheme of the act, the destruction of which would invalidate the whole act. It is by no means clear that, even in the case supposed, this argument could be maintained. But such not being the case the suspension of the 14th section affords no ground for holding that the restrictions and safeguards thrown by the body of the act around the right of debtors to make voluntary assignments should be dispensed with, and debtors left at liberty to exercise that right without restriction or regulation.

If, in the assignment now in question, no reference had been made to the New Jersey statute, it could hardly be pretended that the assignment was assailable; it would stand as valid at common law even if
95 there were no such statute. But it is claimed that the words of the trust, "to distribute the proceeds to and among the creditors of the said William H. Locke in proportion to their several just demands, pursuant to the statute in such case made and provided," indicate that the assignment was made under the statute, and that the statute being suspended the assignment must fall.

This has already been answered by our conclusion that the whole statute was not suspended, and that those parts of it which "regulate the form of the assignment" and the conduct of the assignee remained in force. The reference to the statute was, therefore, appropriate. But it is further claimed and held in the opinion at special term that this reference to the statute shows that the assignor presumed that he would be entitled to the
96 benefit of the provisions of the 14th section, and being mistaken in that the deed is void.

It does not appear that the assignor has ever claimed to avoid the assignment on that ground, and we apprehend that it would be his right, and not that of third parties, to do so. But we do not think the ground tenable by any one. If the 14th section was inoperative it was by reason of the provisions of the Constitution of the United States and of the act of Congress, and of these every citizen is bound to take notice. The legal presumption is, not that the assignor executed the instrument in ignorance of the law, but that knowing the law and knowing that he would not be discharged, and desiring simply to secure an equal distribution of his property and to prevent any creditor from obtaining an unjust preference, he elected to effect this, and by means of a voluntary assignment by
97 which his property would be distributed by an assignee of his own selection under the State law, rather than to have it administered by a court of bankruptcy. That he had the right so to do has been adjudged both by this court and by the Supreme Court of the United States. Thrasher vs. Bentley, 59 N.Y., 649; Haas vs. O'Brien, 66 N.Y., 597; Mayer vs. Hillman, 91 U.S., 496.

The judgment of the special and general terms should be reversed and judgment rendered for the defendants with costs.

"All concur, except Folger & Andrews, *J. J.*, absent."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

(Indorsement on cover:) No. 235. Thomas Boese, as receiver of the property of William H. Locke, plaintiff in error, vs. William King, John M. Goetchius, and Edward E. Poor, assignees of the property & effects of William H. Locke. New York supreme court. Remittitur. Filed 3rd July, 1880.

105-379

OFFICE SUPREME COURT U.S.
FILED
MAR 14 1903
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 235.

THOMAS BOESE, AS RECEIVER OF THE PROPERTY OF WILLIAM H. LOCKE, PLAINTIFF IN ERROR,

vs.

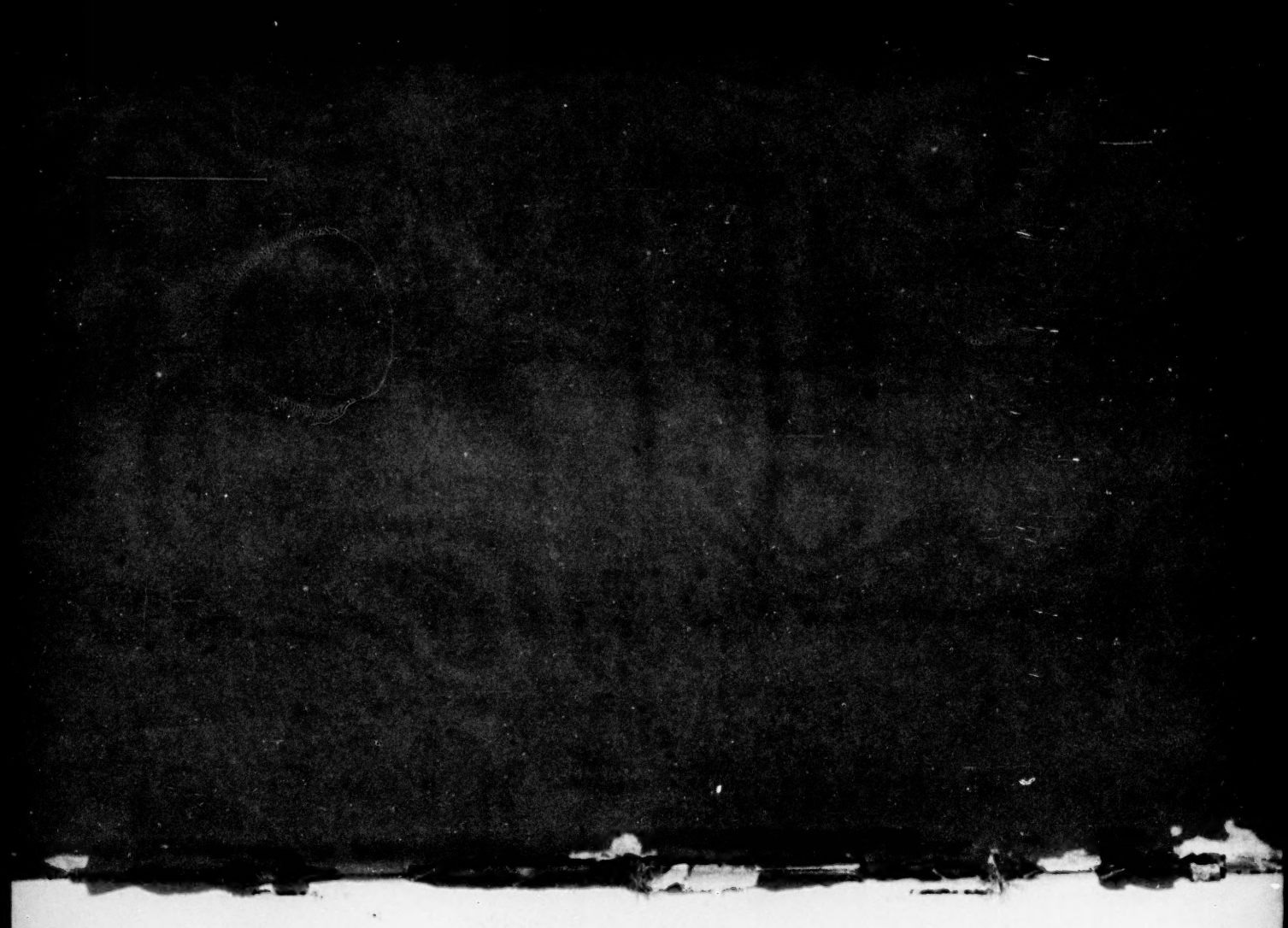
WILLIAM KING, JOHN M. GOETCHIUS AND EDWARD E. POOR, ASSIGNEES OF THE PROPERTY AND EFFECTS OF WILLIAM H. LOCKE, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF PLAINTIFF IN ERROR.

C. BAINBRIDGE SMITH,
Of Counsel.

WILLIAM B. SMYTH, BOOK, LAW, JOB AND CARD PRINTER,
No. 7 New Chambers Street, New York.



SUPREME COURT OF THE UNITED STATES.

THOMAS BOESE, *as Receiver, &c.*,
Plaintiff in error,
vs.
WILLIAM KING, JOHN M. GOETCHIUS, and EDWARD E. POOR,
Assignees, &c.,
Defendants in error.

Brief of Plaintiff in Error.

Statement of Case.

1. The case is brought here by writ of error directed to the Supreme Court of the State of New York to review a judgment of the Court of Appeals of the State of New York which reversed the judgment of the Supreme Court in favor of the plaintiff and rendered judgment absolute in favor of the defendants.

2. The plaintiff is the receiver of the property of William H. Locke, and as such receiver commenced an action in the said Supreme Court against the defendants William H. Locke and William King, John M. Goetchius and Edward E. Poor, assignees, &c., to set aside an assignment executed by said William H. Locke in the State of New Jersey under and in pursuance of the statute of that State to those assignees for the alleged benefit of his creditors.

Complaint, p. 6, marg'l p. 17.

3. The principal if not the only point involved in this controversy is whether the statute of New Jersey under which the assignment was executed is in the nature of a bankrupt or insolvent law, and was superseded and suspended during the existence of the United States bankrupt act of 1867, and the said assignment void. The statute of New Jersey provides for an assignment of the property of an insolvent debtor a distribution of his property and a discharge from his debts.

4. The New York Supreme Court at special term held that the statute of New Jersey was an insolvent law, and suspended while the U. S. bankrupt act was in force and the assignment executed under it void and ordered judgment in favor of the plaintiff.

See opinion of the Court at Special Term, p. 35, marg'l 68.
Judgment, p. 30, marg'l 60.
Boese v. Locke, 52 How. Pr., 145.

5. The defendants appealed to the Supreme Court of the State of New York and the judgment rendered at special term was there affirmed.

See opinion of the Court at general term, p. 39, marg'l 76.
See judgment of affirmance, p. 38, marg'l 74.

6. The defendant William H. Locke submitted to said judgments of the Supreme Court and the defendants William King, John M. Goetchius and Edward E. Poor, assignees, &c., appealed to the Court of Appeals of the State of New York and the judgment of the Supreme Court was reversed and judgment absolute was ordered in favor of those defendants against the plaintiff with costs. From the last mentioned judgment a writ of error has been taken to this court.

Judgment ordered by the Court of Appeals p. 44, marg'l 87.
Writ of error p. 1, marg'l 1.

Assignment of Errors.

FIRST ERROR.—The Court of Appeals of the State of New York erred in reversing the judgment of the Supreme Court of that State, and ordering judgment absolute in favor of the defendants in error against the plaintiff in error.

SECOND ERROR.—The said Court of Appeals erred in reversing the said judgment of the Supreme Court and holding that the statute of New Jersey entitled "An act to secure to creditors an equal and just division of the estate of debtors who convey to assignees for the benefit of creditors, approved the 16th April, 1846," was not an insolvent law and was not suspended by the existence and operation of the U. S. Bankrupt Act.

THIRD ERROR.—The said Court of Appeals erred in holding that the said assignment so executed by the said William H. Locke to William King, John M. Goetchius and Edward E. Poor, assigneees &c., the defendants in error under and in pursuance of said statute of New Jersey was a good and valid assignment, and was not nor was the statute under which it was executed affected by the then existing U. S. Bankrupt Act.

Statement of Facts.

1. The case presents the facts found by the judge before whom the action was tried and his conclusions of law. In cases of this character in the State of New York where there is no dispute about the facts it is not necessary that the case should contain the evidence.

N. Y. Code of Civil Pro., §998.
Finding of Facts and Conclusions of Law, p. 16, marg'l 37.

2. The plaintiff in error was appointed receiver of the property of William H. Locke in the Supreme Court of the State of New York in proceedings supplementary to the return of an execution unsatisfied upon a judgment recovered in that court in favor of Wilhelm Pickhardt and Adolf Kuttroff against said William H. Locke.

IV. Finding of Fact, p. 18, marg'l 55.
N. Y. Code of Civil Pro., §262.

3. On the 23d day of September, 1875, the defendant William H. Locke, then being a resident of the State of New Jersey, in conformity to the requirements of the act of the legislature of

that State, which statute is set forth in the case p. 16, marg'l 37, made and delivered to the defendants William King, John M. Goetchius and Edward E. Poor an assignment of his property, which by the express terms of the assignment is to be distributed under and pursuant to the said act of the legislature of New Jersey. A copy of the assignment will be found on page 7, marg'l 20.

Finding of Fact, p. 28, marg'l 56.

4. The plaintiff in error commenced an action in the Supreme Court of the State of New York against the defendants William H. Locke, William King, John M. Goetchius and Edward E. Poor to set aside said assignment and that they account for the proceeds of said property which were and are in the city, county and State of New York. This action in all its essential features is purely an equitable one, and before the blending of actions at law and suits in equity into one form of procedure in that state it would have been solely cognizable in the Court of Chancery.

Complaint, p. 5, marg'l 17.
Answer of defendant Locke, p. 10, marg'l 25,
Answer of King and ors., p. 12, marg'l 29.

5. The cause was tried at a Special Term of the Supreme Court of the State of New York and the court found as a fact that "All the assigned property which came into the hands of the assignees under said assignment was in the State of New Jersey and was converted by the assignees into money in that state, and afterwards the money being the proceeds of the assigned property was for convenience of the assignees deposited in a bank in New York city as the assignees or some of them had a place of business there."

XI. Finding of Fact, p. 29, marg'l 58.

6. As it appeared that the defendants as such assignees had collected and received out of said assigned property and had in their possession a sufficient amount of money to pay the judgment and all the costs of the proceedings thereon in this action those defendants were ordered to pay the same.

XII. Finding of Fact, p. 29, marg'l 58.
III. Conclusion of Law, p. 30, marg'l 59.
Judgment, p. 30, marg'l 60.

7. The defendants including the defendant William H. Locke appealed from the judgment to the General Term of the Supreme Court of the State of New York and that court affirmed the judgment of the Special Term.

Judgment of affirmance, p. 38, marg'l 74.

8. The defendants other than the said William H. Locke appealed to the Court of Appeals of the State of New York and that court reversed the judgment of the Supreme Court and ordered judgment absolute in favor of those defendants with costs, and from that judgment a writ of error was taken.

Judgment of the Court of Appeals, p. 44, marg'l 87.
Writ of Error, p. 1, marg'l 1.

9. The assignment in question was executed under and pursuant to the statute of New Jersey, which statute is referred to in the second assignmeut of errors, and sections 3, 7 and 14 of the

statute provide for a presentation of the claims of creditors, a distribution of the assigned property and a discharge of the insolvent debtor. Section 14 is as follows:

"14. Nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the person of such debtors or to any estate real or personal not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors or their representatives unless on the trial of such action or hearing in equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment or concealing his estate, real or personal, whether in possesion, held in trust or otherwise."

Statute of New Jersey, p. 19, marg'l 40.

10. The opinion of the court at Special Term rendering judgment in favor of the plaintiff will be found at page 35, marg'l 68 The opinion of the Supreme Court of the State of New York affirming the judgment of the special term will be found at page 39, marg'l 76, and the opinion of the Court of Appeals of the State of New York reversing the judgment of the Supreme Court and ordering judgment in favor of defendants in error will be found at page 45, marg'l 90.

Points and Argument.

First Point.—The statute of New Jersey under which the assignment in question was executed is both an insolvent and a bankrupt law. *Burrill L. Dic. Title "Bankrupt Law;" Id. Title "Insolvent;" Bouvier's L. Dic. Title "Bankruptcy;" Bishon Insolvent Debtors p. 3, 1 Dane's Abridg. 317; 2 Id. 58; Story on Const. §1111; Id. Conflict of L. §338; Klein's case 1 How. U. S. R. 280 note; Sackett v. Andross 5 Hill R. 331 to 341; Murray v. De Rottenham 6 J. C. R. 52, 64.*

I—The New Jersey statute among other provisions provides (section 3, page 17) that the creditors are to present their claims under oath to the assignees and the assignees shall forthwith exhibit to the Surrogate of the county wherein each debtor resides, under oath, a true inventory and valuation of such estate and execute a bond, which bond and inventory are to be filed in the Surrogate's court. Section 6 (p. 18) provides that the assignees or any creditor may at the next term of the court of Common Pleas appear and file exceptions to any claim of any creditor and shall then proceed to hear proofs and allegations and allow the

parties the right to have the matter in controversy tried by a jury. Section 7 (p. 18) provides that at the first term of said court succeeding the expiration of three months, should there be no exceptions made to such claims or if exceptions have been made and they have been adjudicated or settled by the court, the assignees are to make from time to time fair and equal dividends, and as soon thereafter as may be, and not exceeding one year thereafter, shall render on oath a final account to the Orphan's Court of said county in like manner and upon the same notice to creditors as is now directed in regard to executors and administrators and exceptions may be filed to such account and proceeded in as prescribed in regard to executors and the settlement and decree of said court shall be conclusive on all parties. Section 9 (page 18) provides that the said Court of Common Pleas may from time to time if necessary by citation or attachment compel said assignee to proceed to the execution of the duties required by this act until a final settlement and distribution. Section 11 provides that if any creditor shall not exhibit his claim within three months, such claim shall be barred by a dividend. Section 14 (p. 19) provides for a discharge of the debtor from his debts.

Statute of New Jersey p. 16, marg'l 37.

1. The statute contains a thorough revision of the common law relative to the subject of assignments by insolvent debtors and supersedes all existing laws and statutes, if any, upon the subject as effectually as if the statute in express terms repealed them.

Bartlett v. King, 12 Mass. 537, 545.

Commonwealth v. Cooley, 27 Id. 37, 39.

2. It is more comprehensive than the late U. S. bankrupt act, as the statute of New Jersey releases the debtor from all debts including those created by embezzlement, defalcation, fraud, or in a fiduciary character, to those creditors who consent to receive a dividend from the assigned estate; and it has been held by the state courts of New Jersey that the mere presentation by a creditor of his claim for a dividend makes him a party to and bound by the assignment.

Vanderveer v. Conor 5 N. J. Eq. R. (1 Halst.) 437.

Bell v. Fleming 12 Id. (1 Beasl.) 490.

In *Stokes v. Middleton 28 N. J. L. R. (4 Dutcher) 32*, a construction was given to the statute in question and the court held that "the statute was designed to secure an equal and just distribution of the estate of an insolvent debtor among his creditors and to secure to the debtor a discharge of his debts from all creditors who consent to receive a dividend of his property. All the provisions of the act look to this result. *It is in the nature of a voluntary bankrupt law.*"

Stokes v. Middleton 28 N. J. L. R. (4 Dutcher) 32.

3. The "title" of the act to which the Court of Appeals in its opinion refers and upon which the counsel for the defendants in error attached considerable importance in that court fails to convey the design of the statute according to its provisions. The title of the act would have defined more clearly its object had it been expressed in the language of the court just quoted. It would

then have read, "A voluntary bankrupt act to secure an equal and just division of the estates of debtors to and among those creditors who consent to receive a dividend and discharge the debtor from his debts."

In *Klein's case (see note to Nelson v. Carland, 1 How. U. S. R., 280) Mr. Justice Catron* in considering the question before him purposely avoided any attempt to define the mere word bankruptcy. He said: "It is employed in the Constitution in the plural and as a part of an expression, 'the subject of bankruptcies.' The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject Congress has general jurisdiction and the true enquiry is, To what limits is that jurisdiction restricted? I hold *it extends to all cases where the law* causes to be distributed the property of the debtor among his creditors: this is its limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress." * * * "I have spoken of state bankrupt laws. I deem every state law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts within the limits prescribed by the case of *Ogden v. Saunders*. Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies and is a bankrupt law in the sense of the Constitution, and if Congress should pass a similar law it would suspend the state law while the act of Congress continued in force.

Klein's case, 1 How. U. S. R. 280, note.

The case at bar "in substance and fact" falls clearly within the subject of bankruptcies as defined by Judge Catron and as expressed by the courts of New Jersey.

Stokes v. Middleton, 28 N. J. L. R. (4 Dutcher) 32.

II.—There is now no actual distinction, if any ever existed, between a bankrupt and an insolvent law (2 Story on Const. §1111) Formerly an insolvent act was set in motion by the debtor, and bankrupt laws at the instance of the creditors. An insolvent act merely discharged the body of the debtor from imprisonment, while a bankrupt law discharged the debtor not only from imprisonment but also from his debts, although under the various bankrupt acts of England prior to 4 and 5 Anne the bankrupt continued liable for his debts and the dividends received by his creditors under the commission were only considered payments *pro tanto* (*Dane's Abridg. 317; 2 Id. 58; 6 J. C. R. 52, 64; 5 Hill's R. 347*). It was observed by the Chief Justice in giving the opinion

of the Supreme Court in *Sturges v. Crowninshield* that the insolvent laws of many, indeed, of by far the greater number of the States do not discharge the debtor from his debts. They discharge the person of the debtor but leave his obligation to pay in full force (*4 Wheaton, p. 203*).

See 2 Story on Const. §1111.

The statute of the State of New York entitled "Of voluntary assignments made pursuant to the application of an insolvent and his creditors" (*2 N. Y. R. S. 16*), commonly called the "Two-Thirds Act," which discharges the debtor from his debts, has occasioned considerable judicial discussion as to whether it is an insolvent or a bankrupt law. In *Adams v. Story, 1 Paine's C. C. R. 79*, the act is held to be an insolvent law. In *Blancard v. Russell, 13 Mass. 4*, it is stated by Parker, C. J., to be clearly a bankrupt act; and in *Sturges v. Crowninshield* (*4 Wheat. 197*) Marchall, C. J., expressly declines to decide which it is, whether an insolvent or a bankrupt law. (*Shears v. Solinger, 10 Abbott N. S. 287; see 2 Story on Const. §1111*). But the difference between a state insolvent and a state bankrupt law, if any exist, is of no practical importance so far as the subject under discussion is concerned, as all such laws are suspended while a United States bankrupt act continues in force. In *Ogden v. Saunders* the court said, "It," referring to the constitution, "does not extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden, and this principle is described in as appropriate terms as our language affords."

Ogden v. Saunders, 4 Wheat. R. 203-204.

III.—The statute of New Jersey contains the *principle* referred to in *Ogden v. Saunders* as it acts as well upon the person as the property of the debtor, and may strictly be denominated both a bankrupt and an insolvent law.

IV.—The assertion of the counsel for the defendants in error that "*the assignment at bar is a voluntary assignment for the benefit of creditors and is not affected by the U.S. bankrupt act,*" is a pure assumption and the cases cited in support of the postulate with the exception of the cases in Connecticut which are referred to and commented upon hereafter are adjudications upon the effect of voluntary assignments by debtors, not created by statute, which distribute the proceeds of their property equally among their creditors. Such assignments may be regarded as private transactions between the assignors and assignees, and like other trusts cognizable in a court of equity, do not fall within the purview of a United States bankrupt law. The language of the court in *Mayer v. Hellman* (*91 U. S. R., 1 Otto 496*) referring to a

statute of the state of Ohio for the purpose of showing that the assignment in that case was not void and that the statute in connection therewith is not in contravention of the bankrupt act, seems to indicate that a statute containing provisions like those in the statute of New Jersey would be an insolvent law. The language is: "There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves his after acquired property liable to his creditors precisely as though no assignment had been made. The provisions for the enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provisions." The counsel for the defendants in error cited that case and urged it as an authority sustaining the statute of New Jersey and the assignment executed under it. The Supreme Court of New York at general term observed that that case "does not sustain the appellant's view" (*p. 42, fol. 83*, and *17 Hun. R. p. 277*), and the court at special term (*p. 36, marg'l 69, 70*, and *53 Howard's Pr. R. p. 150*) considered the language used by the U. S. Supreme Court as a clear intimation that "if any act by any of its provisions exempts the insolvent from arrest or imprisonment, or relieves his after acquired property from liability to any of his creditors it is in the nature of an insolvent law and repugnant to the bankrupt act" (*p. 36, marg'l 69-70*).

In *Cook v. Rodgers, 31 Mich. R., 491* the assignment under consideration before the court was a simple common law assignment, uncontrolled by any statutory regulations, and the court held, of course, that such an assignment was not affected by a United States bankrupt law any more than any other trust created by the acts of parties, but the observations of the court in respect to the effect of the bankrupt act passed by congress upon the legislation of those states which had absorbed the common law assignments for the benefit of creditors into a local system of insolvency regulations are very pertinently and clearly expressed. The whole scope and purport of the reasoning in that case is entirely consonant with the principle contended for by the counsel for the plaintiff in error.

In *Beck v. Parker, 65 Penn. St. R. 262, Sharswood, J.*, in delivering the opinion of the court in that case said: "The important question which has been agitated, whether the enactment of a uniform law on the subject of bankruptcy by the Congress of the United States *ipso facto* suspends the operation of the insolvent laws of the different states, does not arise in this case. A voluntary assignment by a debtor in failing circumstances to a trustee for the benefit of creditors does not depend for its validity upon any statute and the acts of the assembly which have been passed to regulate it, which require it to be recorded, which compel the assignee to file an inventory and assignment and give security for the settlement of his accounts and the distribution of the assets are no part of the insolvent laws. *The effect of such assignment is not to discharge the assignor or to relieve him from liability or imprisonment* excepting incidentally under the act providing for the abolishment of imprisonment for debt."

Read v. Taylor (*32 Iowa R. 209*) affords an apt illustration of the confusion which has crept into some of the adjudications upon the effect of a United States bankrupt law upon voluntary assignments for the benefit of creditors not created by any state insolvent law. In that case it was held "The enactment of the Federal bankrupt law of 1867 did not operate to *nullify, supersede or wholly suspend the insolvent laws* of the several states; and jurisdiction may be exercised under the State laws, at least until the jurisdiction of the Federal Court has been called into exercise. Day, J., dissenting." But on examining the statute of Iowa in relation to assignments it will be found it merely directs that the property of the debtor shall be equally divided among his creditors. The case is more curious than instructive.

Code of Iowa, 1878, tit XIV., ch. 7.

V.—The statutes of the several states absorbing common law assignments for the benefit of creditors into local systems of insolvency regulations are extremely varied each state having a form of proceedings of its own, but the chief design of them is to distribute the property of the debtor and grant him a discharge either from imprisonment or his debts or both. It is the *form* as well as the *substance* of these diverse systems established in the several states which the United States bankrupt act aims at and supersedes. As was observed in *Martin v. Berry* (*37 California R. 208, 222*). "Two statutes having the same general object and acting upon the same case by different modes and in different jurisdictions must be in conflict with each other. Though the modes by which the remedy is administered may vary, yet when the bankrupt act and the state insolvent law have substantially the same scope and object and act upon the same persons and cases, the insolvent law is suspended." Distribution of the property of the debtor and a discharge from his debts to those creditors who consent to participate in the proceeds of the assigned estate, the statute of New Jersey in express terms promotes and accomplishes.

Martin v. Berry, 37 Calf. R., 208, 237.
Houston v. Moore, 5 Wheat. 23.

Second Point.—The United States bankrupt act of 1867 while in force suspended all state insolvent laws and deprived the state courts of jurisdiction in cases falling within the purview and operation of the bankrupt act. (*Sturges v. Crowninshield 4 Wheat. R. 122; Farmers & Mech. Bk. v. Smith, 6 Id. 131; Ogden v. Saunders, 12 Id. 213; Baldwin v. Hale, 1 Wallace 329; Klein's case, 1 How. U. S. R. 265, note; Ex parte Eames, 2 Story R., 322; Griswold v. Pratt, 50 Mass. (9 Metc.) R. 16; Judd v. Ives, 45 Id. (4 Metc.) 400; Day v. Bardwell, 97 Id. 246; VanNostrand*

v. Carr, 30 Maryl. R. 128; In re Reynolds, 8 R. Is. R. 455; Chamberlain v. Perkins, 51 N. H. R. 336; Rowe v. Page, 54 Id. 190, 194; Martin v. Berry, 37 Calf. R. 208; Commonwealth v. O'Hara, 6 Am. L. Rev. 765; Shears v. Solinger, 10 Abb. N. S. 287; Fisk v. Montgomery, 21 La. A. R. 446; Story on Const., §1111; Cooley's Const. Lim., 4 ed. p. 360, margl. 294, Bump's Bank. Law, 10 ed. 307 to 311; Id. Notes on Const. Decis. p. 72.

I.—When Congress within its constitutional power has legislated upon the subject of bankruptcies, such legislation suspends all insolvent laws and renders all proceedings under them void. The court in *Sturges v. Crowninshield* (*4 Wheat. R. 196*) held that "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the states." Again (*Id. p. 193*), "Whenever the terms in which a power is granted to Congress or the nature of the power requires that it should be exercised exclusively by Congress the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."

Sturges v. Crowninshield, 4 Wheat. R. 193, 196.
See Holmes v. Jennison, 14 Peters R. 576.

There was in *Sturges v. Crowninshield* (*4 Wheat. R. 193*) some diversity of opinion among the judges whether the power to pass a bankrupt law, or an insolvent law having the effect of a bankrupt law, was not exclusively vested in Congress, but the whole court agreed that when Congress did pass a bankrupt act it was supreme, and that the state laws must yield to it and could no longer operate upon persons or cases within the purview of the act.

Ex parte Eames. 2 Story R. 322.
2 Story on Const, §1114.

II—The counsel for the defendants in error will claim that "*The New Jersey statute referred to in the assignment was not in conflict with or suspended by the bankrupt act of 1867, nor was the assignor within the purview of the act,*" and to sustain that position will refer to and cite certain provisions of the act applicable to a particular class of debtors who fall within the purview of those provisions (*§§5014, 5021 U. S R. S*). And here the contending differences between the counsel for the respective parties become conspicuously marked and clearly defined. The principle contended for on the part of the plaintiffs in error is, that by the constitution of the United States the power to enact a bankrupt law is vested in Congress, and when Congress exercises the right,

the several states have no more authority to pass similar laws than they would have to legislate and infringe upon any other powers which by the constitution are conferred upon Congress. State legislative enactments in such cases become a nullity and all judicial proceedings to enforce them are void (*Kimberly v. Ely, 23 Mass. 6 Pick. 452, 454*) while on the other hand a voluntary assignment by an insolvent debtor to a trustee for the benefit of his creditors, which does not depend for its validity upon any statute and is recognized in the state in which it is executed as a common law assignment, may on account of its containing preferences fall within section 5128 of the bankrupt act, and would in an action or proceeding instituted by the assignee in bankruptcy be declared void as against him provided that proceedings in bankruptcy were instituted against the debtor within the time limited by that section. Such are the cases of *Seaman v. Stoughton, 3 Barb. Ch. R. 344; Dodge v. Sheldon, 6 Hill. R. 214; Bostwick v. Burnett, 74 N. Y. R. 317.* But an assignment, voluntary or involuntary, created by a state statute which in its effect accomplishes the ends of distribution of the property of the debtor and his discharge from his debts or some of them, is by the existence of a United States bankrupt act and not in consequence of its containing any special provisions, *ipso facto* void. In the one case the assignment is voidable, in the other absolutely void. This distinction runs through all the authoritative cases, and if that distinction be borne in mind the difference between an assignment for the benefit of creditors which is in the nature of a private trust and a statute under which an insolvent executes an assignment for the purpose of distributing his property and a discharge from his debts becomes at once discernible.

In *Sturges v. Crowninshield (4 Wheat. R. 122, 208)* it was certified by the court "that since the adoption of the constitution of the United States a state has authority to pass a bankrupt law, * * * provided there be no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law."

In *Ogden v. Saunders (12 Wheat. R. 213)* the same principle was reaffirmed and the question is no longer open to controversy, but is the settled law of the court.

Boyle v. Zacharie, 6 Peters, 348.

S. C., Id. 635.

Baldwin v. Hale, 1 Wallace R. 223, 228.

In *Ex parte Eames (2 Story R. 322; S. C. 1 Leg. Ob. 212)* Judge Story said: "My opinion is, that as soon as the bankrupt act went into operation in February last, it, *ipso facto*, suspended all the action upon future cases arising under the state insolvent laws where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different considerations would, or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the bankrupt act went into operation. It appears to me that both systems cannot be in operation or apply to the same persons; and where the state and national legislation upon the same subject and the same persons come in conflict, the national laws must prevail,

and suspend the operation of the state laws. This, as far as I know, has been the uniform doctrine, maintained in all the courts of the United States. Indeed, I consider this whole matter in effect disposed by the reasoning of the Supreme Court in the case of *Sturges v. Crowninshield*, (*4 Wheat. R. 122*)" * * * "The case of *Ogden v. Saunders* (*12 Wheat. R. 213, 254, 273, 276, 278, 296, 311, 314*) fully recognized and has always been understood to confirm and settle the same principle. It seems to me, therefore, that nothing remains upon which an argument can be founded, that the insolvent laws of Massachusetts are not, as to persons and cases, within the provisions of the bankrupt act, completely suspended. *Each system is to act upon the same subject matter, upon the same property, upon the same rights and upon the same persons—creditors as well as debtors. Both cannot go on together without direct and positive collision; and the moment that the bankrupt act does or may operate upon the person or case, that moment it virtually supersedes all state legislation.*"

Ex parte Eames, 2 Story R. 322.

In *Griswold* v. *Pratt*, *9 Metc. R., 16*, the facts were these: The action was trover brought by the assignee of an insolvent debtor. The debtor on the 3d March, 1842, being in a state of bankruptcy applied to a master in chancery for the benefit of the insolvent law of 1838. On the 16th of said March, the plaintiff was appointed, in the matter prescribed by said law, assignee of the goods and estate of said debtor. Afterward, and before the commencement of the action, the plaintiff demanded of the defendant the property alleged in the plaintiff's declaration to have been converted by the defendant, and the defendant refused to deliver it; alleging that the proceedings under said insolvent law were void, by reason of the operation of the United States bankrupt act of 1841, which took effect from and after the 1st of February, 1842, before any proceedings were had, in conformity with the said insolvent law, touching the premises. The property described in the plaintiff's declaration, had previously been attached by the defendant, adeputy sheriff, as the property of the debtor under certain writs. The defendant, as deputy sheriff and by virtue of said writs of attachment, held said property at the time of the demand thereof made by the plaintiff and had since sold the same on executions duly issued on judgments recovered on which said attachments were made. It was agreed that if the plaintiff was entitled to recover, a jury should assess his damages; otherwise that a nonsuit should be ordered. The court before whom the case was argued was composed of Chief Justice Shaw, and Justices Wilde, Dewey and Hubbard. The controlling questions involved in that case are the same as those at bar. The opinion was rendered by Judge Dewey, and concurred in by the other members of the court, and is a clear, exhaustive and conclusive exposition of the law upon the subject. The court held that while the United States bankrupt act of 1841 was in force, all proceedings under the state insolvent law were unauthorized and void. The court on this branch of the subject, after founding its decision upon principle and authority, in conclusion said: (p. 25.)

"Considering our insolvent law to be a system introduced for the purpose of sequestering the effects of an insolvent debtor, and of discharging him from all debts contracted after the enactment of the law; we are satisfied that the two systems cannot stand together; that the provisions of the constitution, authorizing congress to establish a uniform brankrupt law, does not of itself prevent the enacting of insolvent laws by the individual states; yet that when the power is exercised by congress, and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases, and that this effect follows the enactment of such bankrupt law, *and does not require the actual institution of proceedings in bankruptcy to produce such result.*"

"*The consequence is, therefore, that in the present case the proceedings before the Master in Chancery, under the state insolvent law, were unauthorized, and the plaintiff, as assignee of the insolvent, has no legal claim to the property in controversy.*"

Griswold v. Pratt, 50 Mass. R., (9 Metc.) 16.

In *Day* v. *Bardwell, 97 Mass.*, (1867,) p. 246, there was a bill filed in equity by a creditor to set aside the proceedings of a debtor instituted under the state insolvent law of Massachusetts and the court by *Judge Gray* reviews the whole subject of the effect of the bankrupt act upon the insolvent law of that state and re-affirmed the decision of *Griswold* v. *Pratt* that the bankrupt act wholly suspended and superseded the state insolvent law. In this case the bill was not sustained because the proceedings under the state insolvent law had been instituted before the bankrupt act went into effect. *Judge Gray* said: "It is well settled that the power granted to congress by the constitution to establish uniform laws on the subject of bankruptcies throughout the United States, does not, until the power is exercised and such laws are put in operation by congress exclude the right of the states to pass similar laws; and that the operation of the state insolvent laws is therefore superseded and suspended so far at least as the two are applicable to the same persons as soon as a national bankrupt law has taken effect and not before."

Day v. Bardwell, 97 Mass. 246.

In *Van Nostrand v. Carr, 30 Maryl. R. 128*, the debtor applied for the benefit of the insolvent laws. The application was in the usual form and a trustee was appointed. On the 27th June the plaintiffs filed their petition stating that the debts of the applicant exceeded $15,000, and that the pretensions of the trustee were prejudicial to their interests, cast a cloud on their liens and would hinder their enforcement, that by reason of the bankrupt law of the United States the appointment of the trustee was a nullity and prayed that the appointment be revoked. The Court of Common Pleas by an order removed the trustee and dismissed the application of the insolvent and at the same time certified that the court had no jurisdiction over the case, that it was provided for by the bankrupt act of the United States, and that the inability by the petitioner to pay fifty per cent. of the claims against him made no difference; and that by reason of the bankrupt act there was no law of the state providing for such an application in

insolvency. On appeal to the Supreme Court the court in a clear and elaborate opinion unanimously affirmed the order of the court below on the ground that "the power to establish uniform laws on the subject of bankruptcies is conferred upon Congress by the constitution, and it has been settled by the decisions of the Supreme Court that when this legislative power has been exercised it is paramount and exclusive and suspends the operation of the insolvent laws of a state, and the jurisdiction of the state courts over cases falling within the purview and operation of the bankrupt law" (citing many authorities).

Van Nostrand v. Carr, 30 Maryl. R. 128.

In *Chamberlain v. Perkins* (*51 N. H. R. 336*) and *Rowe v. Page* (*54 Id. 190, 194*) the voluntary assignments of the debtors in those cases were created by the statutes of the state of New Hampshire and the court held that the United States bankrupt act on going into operation suspended all state insolvent laws; and that an assignment made as a part of a state insolvent law and deriving all its validity and efficacy from the statute is void

Rowe v. Page, 54 N. H. R. 190, 194.

In *Fisk v. Montgomery, 21 La. Am. R. 446*, the same principle was enunciated by the court. *Howell, J.*, said: "This suit was brought in June, 1866, to compel the defendant to make a new surrender of his property for the benefit of his creditors according to law; was put at issue and when called for trial November, 1867, the defendant pleaded the peremptory exception that Congress having adopted a general bankrupt law the insolvent laws of this state are thereby superseded, *and no state law now existed to sustain the law.*" This exception was maintained and on appeal the court affirmed the judgment.

In re Reynolds 8 R. Is. R. 485 (decided in 1867) the creditors of the insolvent appearing to oppose his petition for the benefit of the insolvent law of the state filed a motion to dismiss the petition upon the ground that the jurisdiction of the court over such cases had ceased to exist after the passage of the bankrupt law of the United States in 1867, it being apparent upon the record that the petitioner's debts exceeded three hundred dollars. The subject was fully and ably argued by counsel for and against the petitioner and comprehensively discussed and decided by the court. The motion was granted. The court in concluding the opinion said: "Our state insolvent law authorizes, upon the application of the debtor, proceedings for the distribution of his property only and the discharge of his person from imprisonment. It does not release the debt. The bankrupt law of 1867 does all this upon such application, and also releases the debt." "Assuming the constitutionality of the bankrupt law in other respects, which has neither been discussed nor denied before us, we must hold that under the decisions and concurring practice to which we have referred, these provisions of the bankrupt law authorizing a debtor to apply for and obtain a discharge of his debts, and providing for a distribution of all his property among all his creditors, are within the legislative power of congress under this grant in the constitution; the system differing in this department only from our

insolvent law in extending the release, but not at all in the provisions for taking possession, through officers appointed by the court, of the entire property of the insolvent and distributing it among all his creditors, covers all the provisions of our insolvent law. It legislates for all of them and for more in its voluntary department, and adds thereto the involuntary department of the law enabling creditors to move for all these processes against the debtor in their own behalf. We must, therefore, find that congress has, within its constitutional powers, legislated upon the entire subject of our insolvent laws. And such legislation it has long been settled, when exercised, suspends the state legislation upon the same subject. We must, therefore, grant the motion." "We may remark that this decision does not cover the law of the state for the discharge of poor debtors from imprisonment. Such laws in this state were adjudged constitutional in the case of *Mason v. Hall, 12 Wheat. 370*, by the supreme court after the decisions in *Sturges v. Crowninshield* and *Ogden v. Saunders* had been rendered."

In re Reynolds 8 R. I. 485.

There is a statute of New Jersey similar to what is familiarly known as "The poor debtor's act," which is entitled "An act for the relief of persons imprisoned on civil process" which is set out at length in the error book (*p. 20*), but it has nothing to do with this case and was offered in evidence on the part of the defendants, and it was claimed by their counsel that that was an insolvent law, although it does not discharge the debtor from his debts.

P. 20 to 27, margl. 42 to 54.

III.—It will be contended on the part of the defendants in error that "The act" of April 16, 1846, (*p. 16*) "*even if it be treated as an insolvent or bankrupt law, is not superseded or suspended by the United States bankrupt act until the two laws come into practical conflict, that is, until proceedings in bankruptcy have been taken, within the time limited by law, against the insolvent, when the United States law must of course prevail.*" The fallacy of this doctrine is apparent.

1. The term "conflict" when used by some of the courts, whose decisions are of unquestionable authority in connection with a United States bankrupt law and a state insolvent law does not mean a physical or practical conflict or positive collision, but that if both laws were in operation they would conflict (*4 Wheat. R. 196*). In the same subdivision of section 8 of the constitution of the United States there is a provision as to "naturalizatiou," and surely it will not be seriously maintained that the several states could legislate upon the subject of naturalization while Congress

had acted upon the power, or that the laws of the states in regard thereto would be valid until there was a practical conflict between the laws of the states and those of the United States. The proposition relative to bankruptcies is well established and very clearly stated by the court in *Van Nostrand v. Carr* (*30 Md. R. 128*) upon the precise point in question. The court said: "The power to establish uniform laws upon the subject of bankruptcies is conferred upon Congress by the constitution; and it has been settled by the decisions of the Supreme Court that when this legislative power has been exercised it is paramount and exclusive, and *suspends* the operation of the *insolvent* laws of a state and *the jurisdiction* of the state *courts* over cases falling within the purview and operation of the bankrupt law," citing *Sturges v. Crowninshield, 4 Wheat. R. 122; Ogden v. Saunders, 12 I 213; Ex parte Eames, 2 Story R. 322 and other cases.*

2. The doctrine contended for by the defendant in error was advanced in *Griswold v. Pratt* and was disposed of by this reasoning of the court: "The only case cited by the plaintiff's counsel, as sustaining a contrary doctrine, is *Ziegenfuss' case, 2 Iredell, 463.* It was there conceded that the effect of the bankrupt law was necessarily to suspend all state laws with which it came in conflict; but it was contended, and the principle was sanctioned by the court, that a state insolvent law may exist and operate with full vigor until the bankrupt law attaches itself upon the person or property of the debtor, by proceedings instituted in bankruptcy: and it was further held, that no case of conflict could arise until after the proceedings in bankruptcy had reached that stage in which the debtor had been judicially declared a bankrupt."

"This principle, that until proceedings in bankruptcy are actually instituted the state insolvent law may be allowed to operate upon the person and property of the debtor, although at first view it may seem plausible, cannot, we think, be sustained." * * *

"*If the proceedings under the insolvent law are valid at all, they must be valid to the extent of carrying out and perfecting such proceedings after they have been once instituted.* Such effect has always been admitted to attach to proceedings legally commenced before the bankrupt law went into operation, but then pending. Sound principle would require that in all cases where proceedings could be legally instituted, they should have the legal capability of being perfected and closed under the state law."

Griswold v. Pratt, (9 Met.) 50 Mass. 16.

Chancellor Kent in his commentaries treating upon the subject of concurrent powers of legislation in the states, after referring to *Sturges v. Crowninshield* (*4 Wheat. 122*), and *Houston v. Moore* (*5 Wheat. 11, 22*), and adopting nearly the language employed by the court, says: "Thus Congress are authorized to establish uniform laws on the subject of bankruptcy, but the states may pass bankrupt laws, provided there be no act of Congress in

force establishing a uniform law on that subject. The states may legislate in the absence of Congressional regulations. It is not the mere existence of the power, but its exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states." * * * "It was, therefore, not a true and constitutional doctrine that in cases where the state governments have a concurrent power of legislation with the national government they may legislate upon any subject on which Congress have acted, provided the two laws are not in their operation contradictory and repugnant to each other."

1 Kent's Com. 388, 389.

3. No principle of law is more clearly settled and more firmly established than that the several states are inhibited to *pass* insolvent laws when the power of legislating upon a uniform system of bankruptcies has been exercised by Congress, and that all existing state insolvent laws are suspended, while a U. S. bankrupt act continues in force. This question is no longer an open one, but is the settled law of the Supreme Court of the United States (*1 Wall. 223, 228; 6 Pet. 348*). And this principle has been followed and acted upon by a long train of decisions of the highest courts of nearly every state in the Union. The question would naturally suggest itself if a state insolvent law were suspended how could it be enforced or adjudicated upon? and yet the Supreme Court of Errors of the state of Connecticut has subverted the fundamental principles laid down by the United States Supreme Court and following the doctrine expressed in *Ziegenfuss' case* (*2 Iredell R. 463*) above referred to, held that the voluntary and involuntary bankrupt or insolvent law of that state was not wholly superseded and suspended by the United States bankrupt act until the two laws came into practical conflict, and then the United States bankrupt law must of course prevail; and although the assignments in those cases were executed under the statute which was an insolvent law, that under the circumstances the court thought they might be sustained "without deciding that a state insolvent law authorizing an assignment in insolvency which would be unauthorized without the statute would not be suspended by the United States bankrupt law." When the court's attention was called to the case of *Griswold v. Pratt, 9 Metc. 16*, the answer was that "the decision of this question does not seem to us to be essential to a disposition of this case." * * * "So far as it appears the assignment and the proceedings under it were but means adopted by the parties for distributing the effects of the insolvent debtor *pro rata* among the creditors." The court also said: "So far as we know there has been no conflict between the federal and state jurisdictions and there need be none. The view that we take of this interesting question does not in the least interfere with the course of proceeding in the United States court. If any insolvent debtor, or any creditor of such, desire that the estate shall be settled in that court, it can be done. If

all the parties concerned desire that it shall be settled in the state courts, as yet, we see no good reason why that may not be done. Should a case arise in which there will be an actual conflict of jurisdiction, the state court must yield to the national. Even in this case should the bankrupt court within the time limited assert its jurisdiction, proceedings in our courts would be thereby superseded. *Should the probate court attempt to grant a certificate of discharge to an insolvent debtor under the law, neither our own courts nor the courts of other states would give effect to any such certificate.*" * o * "In this respect we make a material distinction between discharging the debtor and distributing his assets among his creditors."

*Maltbie v. Hotchkiss, 38 Conn. R. 80.**

Such are the cases of *In re Hawkins' appeal, 34 Conn. R. 551* and *Maltbie v. Hotchkiss 38 Id. 80.* Those cases are chiefly remarkable for their incongruous premises and erroneous conclusions.

In a subsequent case (*Geery's Appeal, 43 Conn. R. 289*), the same court seems to have come to a realizing sense of the constitutional law involved and to which due regard should be paid. It expressed itself as "impressed with the magnitude and importance of the questions," and that "the case was a close one and by no means free from doubt;" but the court although divided and not adopting the reasons assigned in the previous cases came to the same conclusions which were arrived at in them. The facts in the case of *Geery's Appeal* (*43 Conn. R. 289*) are substantially the same as in *Griswold v. Pratt* (*50 Mass. 9 Metc. 16*) with the exception that the insolvent proceedings in the Connecticut case were involuntary, while those in Massachusetts were voluntary. Judge Carpenter states the facts of the case before the court as follows: "The appellant is a creditor of the debtor, a corporation and attached property to secure his claim. The appellee, another creditor, instituted proceedings in insolvency under the statute of the state for the purpose of procuring an equal distribution of the

NOTE.—In *Skeyrock v. Bashore*, 13 Nat. Bank Reg. 481, there is a well considered opinion upon the subject of the United States bankrupt act and its effect upon state insolvent laws, in which *Maltbie v. Hotchkiss* and three cases of a similar character are criticised, and their reasonings and conclusions dissented from. The court referring to *Maltbie v. Hotchkiss*, said: "The argument of Justice Carpenter is based on the distinction between discharging a debtor and distributing his assets. He agrees that should the court attempt to grant a certificate of discharge to an insolvent debtor no court would give any effect to it. This must be on the ground that the bankrupt act did *ipso facto* suspend the state law so far. But he insists that the discharge is the principal thing the bankrupt has in view, and that distribution *pro rata* is but incidental. This ground is scarcely tenable, since *Buchanan v. Smith*, 16 Wallace R., 277-301, in which case Justice Clifford, delivering the opinion of the Supreme Court, says: "Equal distribution of the property of the bankrupt *pro rata* is the main purpose which the bankrupt act seeks to accomplish." And it has no other purpose at all with respect to corporations (see also *Cornwell's Appeal*, 7 W. and S., at page 365. *Commonwealth v. O'Hara*, 1 N. R. R., 86. 6 Phil. R. 402). "That part of the opinion which discusses whether the deed was absolutely void as a violation of the 35th and 39th sections of the bankrupt act we are not concerned with."

"How far these four cases support the proposition they have been cited to sustain we are now able to see, and we think they do not support it in its whole extent, namely that a state law host le to the bankrupt act in either of its two great objects, discharge and distribution pro *rata* is not by it *ipso facto* suspended."

The court then points out the objection to the view taken by the court in *Maltbie v. Hotchkiss* and the three other cases cited, and show they are unsustainable upon principle, and against the greater weight and number of authorities.

Skeyrock v. Bashore, 13 Nat. Bank Reg. 481.

property among its creditors. The court of probate appointed a trustee and the attaching creditor appealed to the Superior Court claiming that the bankrupt law of the United States suspends the operation of the state laws. The corporation is unable to pay its debts and those debts exceed the sum of three hundred dollars. The corporation is in a condition to apply voluntarily for the benefit of the bankrupt act, but it has commenced no act of bankruptcy and is not subject to compulsory proceedings." There is no doubt of the statute of Connecticut being an insolvent law in the broadest acceptation of that term. It is in its character both voluntary and involuntary, and distributes the property of the debtor and grants to him a discharge from his debts (*General Statutes of Conn. p. 343*). The court in its opinion said (*p. 301*): "In regard, therefore, to the effect of congressional legislation upon state legislation, we are unable to perceive the difference that it makes whether the latter relates to voluntary or involuntary proceedings. In either case, if action by the state court contravenes the policy of the bankrupt law, such action is unauthorized and void. It does not defeat or impair any right which the debtor has made under the bankrupt act and we see no objection to its validity." The court then refers to and quotes from the various provisions of the United States bankrupt act—a course which the defendants in error in the case at bar adopted in the court below—for the purpose of showing that the debtor did not fall within its purview, although the court states, "it is not pretended and was not claimed by the learned counsel for the appellant that the debtor was subjected to proceedings in the bankrupt court at the instance of the appellee." The court seems to have either overlooked the distinction or failed to discriminate between a state insolvent law which is suspended by a United States bankrupt act, and an insolvent debtor who may fall within some of its provisions. In such cases all proceedings under the former are void while the acts of the latter may be voidable. If this distinction had been observed much of the confusion in those and similar cases might have been avoided. The court was composed of *Park, Ch. J.*, and *Carpenter, Foster* and *Loomis, J. J.*, and in the opinion delivered by Judge Carpenter, Judges *Pardee* and *Loomis* concurred, the latter *with hesitation. Park, C. J.*, and *Foster, J., dissented.* The views of the dissenting judges are not given, but they are doubtless indicated in *Shepardson's Appeal* (*36 Conn. 23*) in which *Park, C. J.*, said: "The record does not disclose whether or not the insolvent owes debts in the aggregate to an amount less than the sum of three hundred dollars. If he owes more than that amount, the majority of the court concede that the probate court *had no jurisdiction of the case, for the bankrupt act suspends the insolvent act* in cases of involuntary insolvency, where the insolvent owes debts more in the aggregate than that amount."

Shepardson's Appeal, 36 Conn. R. 23.

In Geery's Appeal, (43 Conn. R. 289), the prevailing opinion of the Court by Carpenter, J., is based upon this extraordinary pro-

position: "We are not disposed to adopt and follow the arbitrary principle that the exercise of power by Congress to any extent absolutely annuls and renders inoperative all state legislation irrespective of the intention of Congress". (*Id. p. 302.*) And at page 298, the same learned judge says: "The question for us to determine is, whether this case, upon the facts stated, is within the jurisdiction of the act of Congress. In determining this question we must have regard primarily and principally to the *intention* of Congress as expressed in that act. That intention when discovered will be a sure guide to a correct conclusion." The luring phrase "the intention of Congress" which the court called to its aid does not enter into the discussion as to the exercise of any of the powers conferred by the constitution upon Congress; but the simple question was in that case as it is in the case at bar, whether 'the subject of bankruptcies' is one of the powers which was surrendered by the several states to the federal authorities and whether the exercise of that power by Congress does not forbid the several states legislating and acting upon the same subject (*4 Wheat. 193*). The principle enunciated by the court in Connecticut has upon the precise point been condemned by the decision of the Supreme Court of the United Sates in numerous cases. It has been especially condemned in *Sturges v. Crowninshield*, which involved the identical principle and the court held that "When the terms in which a power is granted to Congress or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it. (*4 Wheat. 193.*)

The decisions of the Court of Errors of Connecticut are founded upon the doctrine that the power of Congress over the subject of bankruptcies is not exclusive but concurrent with that of the states, and, although it is impossible to suggest any other principle applicable to those decisions, it is obvious that it never occurred to the court that it was deciding in those cases a question of constitutional law that the United States Supreme Court had discussed and decided years ago diametrically opposite. This doctrine of concurrent legislation in the states has frequently been before the Supreme Court, not only as to the power of Congress over the subject of bankruptcies but in relation to other powers vested by the constitution in Congress, and the Supreme Court has invariably held that the states had no such concurrent power to legislate when Congress had provided for the same objects. This question has been decided in *Sturges v. Crowninshield, 4 Wheaton, 122; Ogden v. Saunders, 12 Id. 213; Houston v. Moore, 5 Id. 23; Gibbons v. Ogden, 9 Id. 1; Smith v. Turner, 7 How. R., 283, 392; Holmes v. Jennison, 14 Peters, 570, 574;* see also *1 Kent's, Com 389.* The New York Court of Appeals recognized this principle in *Henderson v. Spofford*, (*59 N. Y. R. 131,*) in which it held that "The power to regulate commerce between the states and foreign nations, authorizes congress to legislate upon that subject as well in ports and harbors as upon the high seas. In the exercise of this power, state laws upon the same subject may be abrogated. (*The People v. Brooks, 4 Den. 469; Smith v. Turner, 7 How. U. S.*

R. 395.) But when Congress legislates, it does not repeal but suspends the state law, (*Sturgis v. Spofford, 45 N. Y. R., 446;*) but the court failed to apply the same principle in the case at bar.

Third Point.—In the opinion of the Court of Appeals it is maintained as claimed by the counsel for the defendants in error, that "*if any portion of the New Jersey statute be in conflict with the United States bankrupt act, only that portion is suspended. The remainder of the statute is not affected.*" This is manifestly erroneous in its interpretation of the law governing the case and it cannot be upheld upon principle or authority.

I.—The opinion concedes that the statute of New Jersey taken as a whole is an insolvent law, and it was upon this ground that the Supreme Court at special and general terms held the assignment as an inseparable part of the statute void. The Court of Appeals in order to overcome the effect of the statute in its entirety holds that that part of it which conflicts with the United States bankrupt act may be segregated and disregarded and the proceeds of the property of the insolvent distributed among all his creditors equally, notwithstanding the assignment in express terms authorizes and directs the assignees to distribute such proceeds to and among the creditors pursuant to the statute under which it was executed. The United States bankrupt act and the statute of New Jersey seek to accomplish the same purposes, as both operate upon the person and property of the debtor. In *Buchanan v. Smith, 16 Wallace 277, 301*, it is said that "Equal distribution of the property *pro rata* is the main purpose which the bankrupt act seeks to accomplish,"* and in *Stokes v. Middleton, 28 N. J. R. (2 Dutcher 32)* the court held that: "The statute of New Jersey was designed to secure equal and just distribution of the estate of an *insolvent debtor* among his creditors, and to *secure to the debtor a discharge from his debts* from all the creditors *who consent* to receive a dividend. All the provisions of the act look to this result. *It is in the nature of a voluntary bankrupt law.*"

Opinion of the Court of Appeals p. 45, marg'l 90.
Buchanan v. Smith, 16 Wall R. 277, 301.
Stokes v. Middleton, 28 N. J. L. R. (2 Dutcher 32).

II.—The Court of Appeals in its opinion maintained that

* In Wilson v. Day, 2 Burr. 829, Lord Mansfield said: "The system of every bankrupt law is, that the bankrupt's effects shall be taken out of his own possession and be divided equally amongst all his creditors;" and all insolvent laws proper are set in motion by the debtors (1 *Dane's Abridg.* 317, and cases cited supra).

"even if the whole of the New Jersey statute had been suspended the right to make a voluntary assignment would still have existed, but we do not think that there was any suspension unless it be of the 14th section; and that after the passage of the bankrupt act a debtor making an assignment in New Jersey was still bound to observe the conditions imposed by that act."

Opinion of the Court of Appeals, p. 45, marg'l 93.

1. It is true as the court observes but in a different sense from which it meant to be understood, that even if the whole statute of New Jersey had been suspended the right to make a voluntary assignment would still have existed. The statute of New Jersey, however, could only be suspended upon the ground that it had been superseded by the bankrupt act, which act while in force renders all proceedings under the state insolvent laws null and void.

See cases cited under Second Point supra.

2. It is a universal rule that where a statute requires a thing to be done in a particular way, that way alone must be pursued; but the Court of Appeals is of the opinion that "*if the right to make an assignment had been created by the act, different considerations might enter into the question*, and it might be argued that the 14th section was an essential part of the system and scheme of the act the destruction of which would invalidate the whole act;" and, "if in the assignment in question no reference had been made to the New Jersey statute it could hardly be pretended that the assignment was assailable." If these expressions of the court are to be understood as laying down a legal principle that the right of the debtor to make an assignment was not created by the act and that he could have made a common law assignment for the benefit of his creditors while the statute was in force, it is submitted that the rule of law is just the reverse of that stated by the Court of Appeals.

Op. p. 46, marg'l 94.

(1.) The statute of New Jersey was a complete revision of the previous law upon the subject of assignments by insolvent debtors, and it is well settled that the common law relative to any subject is superseded by a revision of the whole of that subject by the legislature. So a subsequent statute revising the whole subject matter of a former one and evidently intended as a substitute for it, will operate as a repeal of it, though it contain no express words of repeal (*Commonwealth v. Cooley, 27 Mass. 10 Pick. 37, 39; Bartlett v. King, 12 Mass. 537, 545; Ellis v. Page, 18 Mass. (1 Pick.) 37-45; Wakefield v. Phelps, 57 N. H. R. 25; Fair v. Brackett, 30 Verm. 344; City of Prov. v. Union Railroad 21 Alb'y. L. J. 398*).

(2.) In view of the authorities upon the subject it is almost in-

comprehensible how the Court of Appeals should have fallen into the error that if no reference to the New Jersey statute had been made in the assignment it could hardly be pretended that it was assailable. When a statute prescribes a mode by which an insolvent debtor may make an assignment for the benefit of his creditors, no reference to the statute is required to render it valid, for it is deemed to have been made pursuant to the statute, but whether it is in conformity with the statute is to be determined independent of any allusion thereto contained in the assignment under which it was executed. In *Brown v. Reading, 9 N. J. Eq. R. (1 Stockton) 297, 299*, the court held that "If a debtor makes an assignment for the benefit of creditors, such assignment must be in conformity with the statute," * * * and the court added, "he has no right to annex to such assignment a condition which contravenes any provision of the statute."

This principle has been settled by the Court of Appeals itself in *Hardman v. Bowen, 39 N. Y. R. 196*. The head note of that case correctly sets forth the principle involved and decided and is as follows: "In assignments for the benefit of creditors it is necessary that the assignor make the acknowledgement required by the statute (*Laws 1860, ch. 348*) before the title will become vested in the assignees. Even though the assignment be in writing and be delivered together with the possession of the assigned property, creditors of the assignor may attach the property in the hands of the assignees, prior to the making of the statutory acknowledgment. When a statute gives a new remedy though only affirmative in form, if, by its terms, a negative is implied, it is not to be deemed directory merely; thus when the statute requires every assignment to be acknowledged before the proper officer before delivery, it implies that it shall not be delivered before acknowledgment."

Hardman v. Bowen, 39 N. Y. R. 196.

3 The force or propriety of the suggestion of the Court of Appeals that the assignment would be valid at common law even if there were no statute is not apparent, as the right to make the assignment was created by the statute and if the assignment had been in contravention of its provisions it would be void.

Varnum v. Camp, 13 N. J. Law R. 1 Green R. 326.

Garretson v. Brown, 26 N. J. L. R. (2 Dutcher) 425, 437.

The assignment recites that it is executed "pursuant to the statute in such case made and provided" (assignment, p. 8, marg'l 21). This is equivalent to an incorporation of all the provisions of the statute in the assignment itself. It was so decided in *Hawkins' Appeal, 34 Conn. R. 548, 551*, and the decision of the court in that respect is correct and in accordance with the familiar rule that where two instruments are executed on different occasions relating to the same subject matter and the one last executed refers to and is based upon the former one they are to be read together as if they were part and parcel of one instrument (*French v. Carhart, 1 N. Y. R. 96, 109; Flagg v. Munger, 9 Id. 483; Coddington v. Davis, 1 Id. 186, 188*).

4. An assignee in a voluntary assignment not controlled by any legislative enactment as to the mode of distributing the proceeds of the property transferred under it is bound to execute the provisions contained in an assignment as effectually as if he had entered into an express covenant to do so. (*Cunningham v. Freeborn, 11 Wend. R. 240, 247; Waterbury v. Westervelt, 9 N. Y. R. 605; Ogden v. Peters, 21 Id. 23; Bishop on Insolvent Debtors, 176*).

So where a debtor annexes an illegal condition to such an assignment "the court must pronounce the assignment itself void. It cannot hold the transfer good and disregard the condition; for that would be to take the property from the assignor against his will. He having consented to part with his property only on certain conditions, the transfer and conditions must stand and fall together. If, therefore, the court upholds the assignment it must of necessity protect and enforce the terms and conditions upon which it is made. It cannot substitute its own discretion for that with which the assignor has in express terms invested the assignee."

Jessup v. Hulse, 21 N. Y. R. 168, 170, 171.
Bishop on Insolv. Debtors, p. 83, 84.

5. If an assignment by a debtor for the benefit of his creditors is executed under a statute to which it refers, the statute must be followed. In the case at bar the court at special term held: "The assignees are to distribute the funds according to the laws of New Jersey, and they would violate the provisions of the trust deed did they make a distribution without complying with the provisions of those laws as it seems to me a necessary consequence that the assignor undoubtedly presumed he would be entitled to the protection provided by the statute pursuant to the provisions of which his assigned estate was to be distributed" (*Opinion at Special Term, p. 33, marg'l 64*). This is a correct exposition of the law and is in conformity with the decisions of the state courts of New Jersey in which the statute has received a judicial construction. The decision of the Court of Appeals runs counter to the well settled rule of law that where a statute directs a thing to be done in a particular way, that way must be pursued; and also contravenes an equally well settled principle that where an illegal condition is annexed to a voluntary assignment not governed by any legislative enactment the court must declare the assignment void. In these respects the reasoning of the court and the conclusions arrived at are at variance with *Jessup v. Hulse* (*21 N. Y. R. 169*), and *Hardman v. Bowen*, (*39 N. Y. R. 196*) although they are in the same court.

6. If the decision of the Court of Appeals be a correct exposition of the law, it is obvious not only must a part of the New Jersey statute be annulled, but a portion of the assignment executed under it be declared inoperative and void; for the assigned

property is to be distributed according to a statute which in express terms directs how such distribution shall be made, while the Court of Appeals holds that the debtor intended otherwise and the property is to be distributed among all his creditors equally; and by this process of adjudication the court has undertaken to make an assignment for the insolvent debtor different in its terms from the one which he made and one he never contemplated executing. "Equity may compel parties to execute their agreements, but it has no authority to make agreements for them or to substitute one agreement for another."

Curtis v. Leavitt 15 N. Y. R. 163.

III.—The Court of Appeals also remarks: "But it is further claimed and held in the opinion at special term that the reference to the statute shows that the assignor presumed that he would be entitled to the benefit of the provisions of the 14th section, and being mistaken in that the deed is void. *It does not appear that the assignor has ever claimed to avoid the assignment and we apprehend that it would be his right and not of third parties to do so.* But we do not think the ground tenable by any one. If the 14th section was inoperative, it was by reason of the provisions of the constitution of the United States, and if the acts of Congress and of these every citizen is bound to take notice. *The legal presumption is not that the assignor executed the instrument in ignorance of the law, but that knowing the law and knowing that he would not be discharged*, and desiring simply to secure an equal distribution of his property and to prevent any creditor from obtaining an unjust preference, he elected to effect this and by means of a voluntary assignment by which his property would be distributed by an assignee of his own selection under the state law, rather than to have it administered by a court of bankruptcy. That he had the right so to do has been adjudged both by this court and by the Supreme Court of the United States. *Thrasher v. Bentley, 59 N. Y. R. 649; Haas v. O'Brien, Mayer v. Hellman, 91 U. S. R. 496.*"

Opinion, p. 46, marg'l 95-97.

1. The law thus laid down by the Court of Appeals is a wide departure from the true legal principles which obtain in such cases. An assignor can never avoid an assignment made by him unless it was executed by duress or fraud, nor can he avoid any provision therein made for his benefit. (*Bishop on Insol. Debtors 132, 176*). It must stand or fall as an entirety. In the assignment in question the assignor directs his assignee to distribute the proceeds of the assigned estate to and among his creditors under and pursuant to the statute, which statute discharges the debtor from all existing indebtedness of every nature and kind if the creditors consent within three months to receive a dividend; and it is, therefore, an unauthorized assumption on the part of the court to

hold that the assignment in question distributes the property of the assignor equally among his creditors.

Statute of New Jersey, §14, p. 19.
Vanderveer v. Conover, 5 N. J. Eq. (1 Halstead) R. 457.
Bell v. Fleming, 12 Id. (1 Beasly) R. 490.

2. A party must in all cases be held to have intended that which is the necessary consequence of his acts, and this axiom is of frequent application to assignors who have executed assignments for the alleged benefit of their creditors, and consequently no such legal presumption arises as laid down by the court, that the assignor knowing the law and knowing that he would not be discharged executed the assignment for the equal distribution of his property among all his creditors when the assignment and the statute under which it was executed contain provisions to the contrary. In *Stewart v. Moody, 1 Cr. Mees and Ros. 177 (S. C., 5 Tyrwh. 493)*, it was held that where a trader assigned by deed all his property in trust for the benefit of his creditors it was held that it was an act of bankruptcy under 6 Geo. 4 Ch. 16 §3, *although in so doing he did not intend to defeat or delay his creditors*, as that being the necessary consequence of the assignment he meant in law to be taken to have intended it. The language of the court is, "*it has been clearly settled that if the necessary consequences of a man's act is to delay his creditors he must be taken to have intended it.*" The assignment in that case was declared void.

IV—The Court of Appeals decides that the debtor had the right to make such an assignment and cites the cases of *Thrasher v. Bentley, 59 N. Y. R. 649; Hass v. O'Brien, 66 Id. 597*, and *Mayer v. Hellman, 91 U. S. R., 597*, in support of its decision. The court, however, could not have been meant to be understood that according to those authorities the right is conferred upon a debtor to make an assignment such as was in fact made under the statute in question, but they must have been referred to for the purpose of sustaining an assignment which the court by expunging a portion of the statute under which it was executed, has made for the debtor. In the case of *Thrasher v Bentley (59 N. Y. R. 609)*, as reported, owing to the meagreness of the facts it contains, it is difficult to ascertain the precise point involved and what the court really meant to decide; but from what can be gathered from the case it seems the court held that an assignment for the benefit of creditors by an insolvent debtor which gives no preferences and where no proceeding in bankruptcy has been taken, is not void as in hostility to the bankrupt act. The decision seems to be founded on the fact that the assignment was not created by any legislative enactment, and the court intimated that the statute which requires the assignee to give a bond for the faithful discharge of his duties might be suspended by the bank-

rupt act, but that would not affect the validity of the assignment. In *Haas v. O'Brien* (*66 N. Y. R. 597*), the question involved was whether a voluntary assignment made in and under the laws of the state of New York which was not created by any statute was incompatible with the bankrupt act, and the court held that such an assignment made in good faith without intention to defeat the object, impair or impede the operation or evade any of the provisions of the bankrupt act and which transferred all of the insolvent's property without preference, was not a violation of the spirit and intent of that act and was not void *per se*. (See *Opinion of the General Term of the Supreme Court p. 41, marg. p. 80.*) The case of *Mayer v. Hellman, 91 U. S. R. (1 Otto) 496*, is also cited.

These cases upon which the Court of Appeals seems to rely do not afford any authority for holding the assignment made by the insolvent under the statute in question valid and not repugnant to the bankrupt law. Although the point contended for by the plantiff in error is not decided in any of those cases, yet the case of *Mayer v. Hellman* tends to a collateral confirmation of the principle sought to be established; and that case with the others is only made analogous by striking out a part of the statute under which the assignment in question was executed, and assuming as a fact, which does not exist, that it is a common law assignment; and by this novel process overturning the uses which adjudicated cases are intended to subserve and reversing the ordinary course of judicial determination.

V.—If the decision of the Court of Appeals be law, or as it has been termed evidence of the law, the logical sequence would follow that there is no suspension of a state insolvent law, while a United States bankrupt law is in force, and all the light that has been shed and all the learning and research heretofore bestowed upon the subject by courts distinguished for their profound knowledge of the law have been misapplied and misdirected; for, according to the Court of Appeals, the assignment of the debtor under any state insolvent statute would be valid, while those parts of it which conflicted with the bankrupt act would be void. Even the proceedings under the New York insolvent law which has already been referred to and is commonly called the "Two Thirds Act," would not be suspended while a United States bankrupt act existed. (*Sturges v. Crowninshield, 4 Wheat. 208*) The court to be consistent would necessarily hold in a case of that character, as it did in this, that the debtor knowing the law and knowing that he would not be discharged merely elected that mode of distributing his property equally among his creditors, which he had a right to do. (*Shears v. Solinger, 10 Abb. N. S. 287*). To these absurd conclusions the decision of the Court of Appeals irresistibly leads. *Reductio ad absurdum* is an appropriate test of such legal sequences. The assignment under an insolvent law is a part of the machinery of such law, and if a United States bankrupt act while in force suspends all state insolvent laws, how and by

what process of reasoning can it be held that the assignment, which may be termed the motor power of carrying the insolvent law into effect, is valid? It has already been shown that the decisions of the United States Supreme Court are uniform and hold the reverse; and the precise point has been decided by the state courts whose decisions are in harmony with that court. In *Griswold v. Pratt, 50 Mass. R. (9 Metcalf) 16*, the plaintiff as assignee under a *voluntary assignment* executed by an insolvent debtor pursuant to the statute of Massachusetts, while the bankrupt act of 1841 was in force, sought to recover in an action of trover certain property in the possession of the defendant which had been transferred by the assignment, the defendant pleaded as a defence that the proceedings under the insolvent law were void by reason of the operation of the United States bankrupt act and the court so held. And in *Rowe v. Page (54 N. H. R. 190, 194)* it was expressly held that an *assignment* made as a part of a state insolvent law and deriving all its validity and efficacy from the statute is in consequence of the bankrupt act of 1867 void. In each of the last two cases an opportunity was afforded to those courts to consider and follow the rule such as was laid down and followed by the Court of Appeals and expressed in these words, that "the legal presumption is, not that the assignor executed the instrument in ignorance of the law, but that knowing the law and knowing that he would not be discharged, and desiring simply to secure an equal distribution of his property he elected to effect that end by adopting that mode of distributing it, and, therefore, the reference to the statute was appropriate." Those courts it seems were not moved by any such considerations. They did not descend to the work of paring the statutes under which the assignments were executed in order to give them effect, but with a clear comprehension of the constitutional question involved they based their decisions upon the fundamental rules of law as laid down by the United States Supreme Court: that the existence of a United States bankrupt act suspended all state insolvent laws and deprived the state courts of jurisdiction over cases arising upon such laws, and consequently held that the assignments executed under the state insolvent laws were *ipso facto* void.

Fourth Point.—The judgment of the Court of Appeals reversing the judgment of the Supreme Court at special and general terms should be reversed.

C. Bainbridge Smith,
Of Counsel for Plaintiff in Error.

108-379

SUPREME COURT U.S.
FILED
MAR 28 1883
MATTHEW McKENNEY, Clerk.

Supreme Court

OF THE UNITED STATES

No. 235.

THOMAS BOESE, as Receiver of the Property of William H. Locke,

Plaintiff in Error,

against

WILLIAM KING, JOHN M. GOETCHIUS and EDWARD E. POOR as Assignees of the Property and effects of William H. Locke,

Defendants in Error.

Statement and Points for Defendants in Error.

MARTIN & SMITH,
Attorneys for Defendants in Error,
50 Wall Street,
New York City.

A. P. Whitehead,
M. W. Divine,
Of Counsel.

New York:
Charles S. Hamilton & Co., Printers, 61 Cedar Street.

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Defendants in Error.

Statement and Brief for Defendants in Error.

AN ABSTRACT OR STATEMENT OF THE CASE.

1st. On April 16, 1846, an Act of the Legislature of the State of New Jersey was passed, prescribing the terms of voluntary assignments for the benefit of creditors, and the mode of administration of the trusts thereby created.

It is set forth at length in the findings of fact (Record pages 16 to 20, inclusive), and is entitled "An Act to secure to cred-" itors an equal and just division of the estates of debtors " who convey to assignees for the benefit of creditors."

Sections 1 and 2 (p. 17) prescribe the terms of such instruments, viz.: Section 1 provides that every assignment shall be made for the equal benefit of the creditors of the assignor, in proportion to their several demands, preferences being declared fraudulent and void.

Section 2 provides that an inventory of the debtor's estate and a list of his creditors shall be annexed to the asssignment.

The other sections, with the exception of the 11th and 14th, prescribe the duties of the assignees, as to giving public notice of the assignment, exhibiting an inventory and valuation of the assigned estate, giving security for the faithful performance of the trust, advertising for creditors to present their claims, or be barred of a dividend, filing a list of creditors, declaring dividends, and rendering a final account, &c.

Vide Sections 3 to 10, 12 and 13, and 15 to 20, inclusive, Record, pp. 17 to 20.

Section 11 prescribes the time within which creditors shall exhibit their claims or be barred of a dividend.

(Record, p. 18.)

Section 14 is as follows: (Record, p. 19.)

"Nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims, either in regard to the persons of such debtors, or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid, for a dividend, they shall be wholly barred from having afterwards any action or suit at law or equity against such debtors, or their representatives, unless on the trial of such action or hearing in equity the said creditors shall prove fraud in the said debtor or debtors, with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust or otherwise."

2d. An insolvent law was also passed by the Legislature of New Jersey, on April 16, 1846, a copy of which appears at

pages 20 to 27, inclusive of the record. It is not claimed that the assignment hereinafter mentioned was executed in pursuance of this law.

3d. On September 23d, 1875, the defendant Locke, then a resident of New Jersey, made and delivered to the defendants, King, Goetchius and Poor, a voluntary assignment for the equal benefit of all his creditors.

Vide assignment, Record, pages 7 and 8.

The trust is as follows: "In trust to take possession of and "collect, and to sell and dispose of the same, at public or "private sale, in their discretion, and to distribute the pro- "ceeds to and among the creditors of the said William H. "Locke, in proportion to their several just demands, pursu- "ant to the statute in such case made and provided." (p. 8.) The trial judge found as a fact that said assignment "was "executed and delivered by the defendant Locke, and ac- "cepted by the other defendants in good faith, and without "any intent to hinder, delay or defraud the creditors of the "said Locke, or any of them, but with the intent, *bona fide*, "to make an equal distribution of the proceeds of the assigned "estate among the creditors of said Locke, in conformity to "the requirements" of the statute in relation to assignments above referred to.

5th Finding of Fact. Record, page 28, fo. 57.

4th. The defendants accepted the trusts reposed in them by the assignment, and gave security to the proper officer in New Jersey, in $200,000 and upwards, for the faithful performance of their duties as assignees, pursuant to the requirements of that statute.

6th Finding of Fact, Record, p. 29.

5th. The trial judge further found as a fact that "All the as- "signed property which came into the hands of the assignees, "under said assignment, was in the State of New Jersey, and "was converted by them into money in that State, and after- "wards the money, being the proceeds of the assigned prop- "erty, was, for the convenience of the assignees, deposited in "a bank in New York City."

11th Finding of Fact, Record, p. 29.

6th. On February 3, 1876, the firm of Pickhardt & Kuttroff, creditors of Locke, recovered a judgment in the Supreme Court of the State of New York against said Locke for $3,086.85. On May 12, 1876, an execution issued on that judgment was returned unsatisfied.

3d Finding of Fact, Record pp. 27–8.

7th. Afterwards, proceedings supplementary to the return of the said execution unsatisfied were instituted against the defendant Locke, on said judgment, under and pursuant to to section 292 of the Code of Procedure of the State of New York, then in force; defendant Locke was examined in said proceedings before one of the judges of the Supreme Court, and on May 27th, 1876, upon the application of the said judgment creditors, Pickhardt & Kuttroff, in said proceedings, the plaintiff was, by consent of the parties thereto, and by an order of one of the judges of said Court, appointed Receiver of the property of the said defendant Locke, and the said order was, on the 6th day of June, 1876, filed and recorded in the office of the Clerk of the City and County of New York. On the 7th day of June, 1876, a certified copy of the said order was delivered to plaintiff, and plaintiff, on the same day, qualified as such Receiver.

4th Finding of Fact, Record, p. 28, fo. 56.

8th. Afterwards, and on June 9th, 1876, the said judgment creditors, Pickhardt & Kuttroff, caused this action to be commenced by plaintiff nine months after the execution of the assignment.

10th. Finding of Fact, Record, p. 29.

9th. No proceedings in bankruptcy have ever been taken against the defendant, Locke.

9th Finding of Fact, Record, page 29.

10th. The judge before whom the case was tried, sitting at Special Term, held the said act of the Legislature of New Jersey, relating to voluntary assignments, to be *an insolvent law*, and as such, to be "suspended and of no effect" by operation of the U. S. Bankrupt Law, and that the assignment in question "is, by reason thereof, void and of no affect as

"against the plaintiff in this action," and ordered judgment in favor of plaintiff against defendants for the full amount of said judgment with interest, costs and an additional allowance of 5 per cent. on the amount of the judgment.

1st and 3d conclusions of law, Record, pages 29 and 30.

To these rulings and each of the same defendants duly excepted.

Vide defendants exceptions, Record, page 33.

On the first Monday of June, 1877, judgment was entered against the defendants, King, Goetchius & Poor, and in favor of the plaintiff, Boese, as receiver, in conformity with the decision and directions of the Trial Judge at Special Term.

(Record, pp. 30–31).

The defendants, King, Goetchius & Poor, on June 7th, 1877, appealed from said Judgment to the General Term of said Supreme Court.

(Notice of Appeal, Record, page 5).

That appeal was afterwards argued at General Term before presiding Judge Noah Davis and Judges Brady and Ingalls, upon the judgment roll containing the pleadings, the Trial Judge's findings of fact and law, and defendants' exceptions thereto, and the judgment of the Court at Special Term was, on March 28th, 1879, affirmed, the Chief Justice dissenting and Judge Ingalls concurring, "with some hesitation," in the affirmance.

Record, p. 43, fol. 84,) order of affirmance, Record, pages 37–38.

Judgment of affirmance was entered April 1, 1879.

(Record, p. 38).

Thereupon, on April 8th, 1879, the defendants, King, Goetchius and Poor, appealed from that judgment to the Court of Appeals of the State of New York.

(Notice of Appeal, Record, pp 38–39).

That appeal was afterwards argued, and on November 11th, 1879, the judgment of the General Term was reversed by

said Court of Appeals, and judgment rendered in favor of said defendants, King, Goetchius & Poor, with costs.

(Remittitur, Record, p. 4).

Afterwards, and on April 6th, 1880, the said judgment of said Court of Appeals, was made the judgment of the Supreme Court, and final judgment was entered in favor of defendants, King, Goetchius & Poor.

(Order, &c., Record, pp. 43–44).

Thereupon, and on April 16th, 1880, plaintiff obtained a writ of error and caused a citation to be served on said defendants, copies whereof appear in the record at pages 1 to 4, &c.

The claim of plaintiff in error is in substance that the 14th section of the New Jersey Statute had the effect to convert that statute into an insolvent or bankrupt law; that as an insolvent or bankrupt law it was suspended by the Federal Bankrupt Act of 1867, and that the assignment is void because it contains on its face a reference to that (as alleged) suspended statute.

These claims defendants in error deny. They contend

1st. That if the 14th section of the New Jersey Statute be held to have been in conflict with the U. S. Bankrupt Act, the effect of such conflict was, merely, to suspend *that section*, leaving the other sections of that statute in force.

2d. That even if the N. J. Statute be deemed to be an insolvent or bankrupt law, it was not wholly suspended by operation of the U. S. Bankrupt Law, but only so far as the two laws came in conflict.

3d. That the New Jersey Statute was not in conflict with, nor suspended by, the Federal Bankrupt Act of 1867.

4th. That even if the New Jersey Statute be deemed an insolvent or bankrupt law, it was not suspended nor superceded until proceedings in bankruptcy were duly taken against the assignor, pursuant to the Federal act, and no such proceedings having ever been taken, no suspension of the New Jersey Statute has occurred.

5th. That if the New Jersey Statute be treated as suspended or even as repealed by operation of the United States Bankrupt Law, the assignment in question would be valid as a common law assignment for the benefit of creditors, the words referring to the statute being in that aspect of the case mere surplusage.

FIRST POINT.

If it be, for the present, assumed that the 14th section of the N. J. Statute was in conflict with the U. S. Bankrupt Law, the effect of such conflict was merely to suspend that section, leaving the other provisions of the statute in force

I.—Aside from its 14th section, the intent of the New Jersey Statute is,

1st. To prescribe the terms of voluntary assignments for the benefit of creditors; and, 2d, to prescribe the mode of administration of the trust created by such assignments. The title is as follows: "An Act to secure to creditors an equal "and just division of the estates of debtors who convey to "assignees for the benefit of creditors" (Record, pp. 16–17). Sec. 1, provides that every such assignment "shall be made "for the equal benefit" of all the creditors of the assignor, "and all preferences of one creditor over the other, or where- "by any one or more shall be first paid, or have a greater "proportion in respect to his, her or their claim than another, "shall be deemed fraudulent and void, excepting mort- "gage and judgment creditors," &c. (p. 17). Sec. 2, provides that a sworn inventory of the assignor's estate, real and personal, shall be annexed to the assignment (p. 17). The other sections, from three to 13 inclusive, and from 15 to 20 inclusive, *relate to the manner in which the trusts created by such assignments shall be executed and administered.* Sections 3 and 4 (p. 17) prescribe the duties of the assignees as to giving public notice by advertisement of the assignment, calling on the creditors to present their claims, presenting and filing with the proper officer a sworn inventory of the estate, and giving a bond in double the amount of the inventoried valuation for the faithful performance of their trust.

Sec. 5 (pp. 17–18) provides that at the expiration of three months from the date of the assignment, the assignees shall file with the proper officer a sworn list of the creditors, with a statement of their respective claims, having first advertised for the six weeks next preceding the expiration of said term of three months, for the creditors to present their claims or be barred of a dividend.

Sec. 7 (p. 18) provides that the assignees shall make fair and equal dividends among the creditors of the assets, and that they shall render a final account under oath, &c., to the Orphan's Court of the county, in the same manner, and on the like notice to creditors as is directed in regard to executors or administrators, &c.

Secs. 8 and 9 (p. 18) provide for commissions and allowances to the assignees, and empower the Court, by citation and attachment, to compel them to account.

Sec. 11 (p. 18) provides that if the creditors neglect to exhibit their claims within the term of three months allowed for that purpose, such claims shall be barred of a dividend, unless the estate prove sufficient after the claims exhibited are fully satisfied, or unless such creditor shall find some other assets not accounted for by the assignees before distribution, in which case the barred creditor shall be entitled to a ratable proportion therefrom.

Secs. 12 and 13 (p. 18, 19) proscribe the powers and duties of the assignees as to the sale, collection, recovery, &c., of the assigned estate, real and personal. Sec. 15 (p. 19) relates to the fees to be allowed to the officers of the Orphans' Court for their services, &c.

Secs. 16 and 17 (p. 19) relate to the mode of executing the trust in the event of the death of the assignee.

Sec. 18 (p. 19) relates to the removal of the assignee in case of his failure to give proper security, when required by the Court, or for misconduct, and to the appointment of a substitute.

Secs. 19 and 20 (p. 20) contain provisions not material to the questions presented by this case.

Taken together, these provisions constitute such a law as that passed upon in Mayer *vs.* Hellman, 91 U. S., p. 496, where, in reference to the Statute of Ohio entitled "An Act regulating the mode of administering assignments in trust for the benefit of creditors," this Court says: "It is not an "insolvent law in any proper sense of the term; it does not "compel or, in terms, even authorize assignments. It as- "sumes that such instruments were conveyances previously "known, and only prescribes the mode by which the trust "created shall be enforced; it provides for the security of "creditors, by exacting a bond from the trustees for the dis- "charge of their duties; it requires them to file statements "showing what they have done with the property, and "affords, in various ways, the means of compelling them to "carry out the purposes of the conveyance. The provisions "for enforcing the trust are substantially such as a Court of "Chancery would apply in the absence of any statutory "provision."

(Opinion, p. 502.)

Superadded, however, to these provisions, is a single section, the 14th, *which relates wholly to the effect upon the creditor's claim of presenting it for a dividend.* That section provides that nothing in the Act shall be taken or understood as discharging the debtor from liability to creditors who may not choose to exhibit their claims, either in regard to the person of the debtor, or to any estate, real or personal, not assigned; "but with respect to the creditors who shall come "in under said assignment and exhibit their demands, as "aforesaid, for a dividend, they shall be wholly barred from "having afterwards any action or suit, at law or in equity, "against such debtors or their representatives, unless" in the event of fraud, concealment of property, &c., on the part of the assignor.

Record, p. 14.

On the foregoing recapitulation of the provisions of the N. J. Statute, we submit:

1st. That there is no such connection between that fourteenth section and the other sections as would, in the event

of the suspension of the former, involve the suspension of the latter.

2nd. The fourteenth section is entirely distinct from, and independent of, the other sections.

3d. Its elimination from the N. J. Statute will leave the other provisions relative to the terms and mode of administration of insolvent assignments intact and complete.

4th. Such assignments can be made and their trusts performed "pursuant to" that statute, whether the fourteenth section be operative or not.

5th. As stated in the opinion of the N. Y. Court of Appeals, "There is no such necessary connection between this 14th section and the other provisions as to require that they should fall because of this section becoming inoperative."

Record, p. 45.

6th. The only connection between the 14th section and the other provisions is that they are parts, but distinct and independent parts, of the same statute.

It is an elementary rule of constitutional law that a statute is void only so far as its provisions are repugnant to either the National or State Constitution; and that while one provision of an act may be void, other provisions are not thereby affected, unless such other provisions are so dependent upon, and connected with, the void provisions that, by themselves, they have no validity; and it cannot be presumed that the Legislature would have passed them alone.

Sedgwick on the Construction of Statutory and Constitutional Law, p. 413 and note A.

Bank of Hamilton *vs.* Dudley's, Lessee, 2 Peters, 526.

Fisher *vs.* McGirr, 1 Gray, 22.

Matter of De Vaucene, 31 How. Pr., 289.

Phillips *vs.* N. Y., 1 Hilton, 483.

Commonwealth *vs.* Kimball, 24 Pick., 361, and numerous other cases collected in 12th U. S. Digest, p. 737, Sec. 726.

A bankrupt act, when passed by Congress, being author-

ized by the constitution, acquires all the force and characteristics of a constitutional provision, and hence the above rule of construction should be applied as between Congressional and State Acts, to determine the effect of the former upon the latter; and if applied in this case, the result, we respectfully submit, is, that only the fourteenth section of the N. J. Statute can be held to have been suspended, and that the other parts of that statute which regulate the form of assignments for the benefit of creditors, and the conduct of assignees remain in force.

If this view be correct, the reference to the N. J. Statute contained in the assignment was undoubtedly proper; and the validity of the assignment was not in any manner affected by the suspension of that 14th section.

II.—The provisions of the 11th Section, in connection with those of the 3d and 5th Sections, are a mere embodiment of the practice of Courts of Equity in cases where a decree for the administration of assets has been made, involving an inquiry as to who the creditors are, as well as in to the amount of their claims.

"It may be noticed, with reference to inquiries of this "nature, that, in almost every decree by which they are "ordered, it forms a part of the usual directions 'that the "'master shall cause advertisements to be published in the "' , and such other public papers, as he shall "'think fit, for the creditors of the said "' to come in and prove their debts, and that "'he shall fix a peremptory day for that purpose, in default "'of which they are to be excluded from the benefit of the "'decree.'"

Daniell's Chy. Plds. and Prac., Vol. 2d, pp. 1203–5.

Murray Hoffman's Office and Duties of Masters in Chancery, pp. 180–1.

Thompson *vs.* Brown, 4 Johns. Chy., 647.

Grinnell *vs.* Mercht's Ins. Co., 1 C. E. Green, p. 283.

Anonymous, 9 Price Exchequer R., p. 210.

III.—In answer to the suggestion (Record, p. 37), "That "the assignor undoubtedly presumed that he would be enti- "tled to the protection provided for by the statute, pursuant "to the provisions of which his assigned estate was to be "distributed," viz., to the benefit of that 14th section, we say:

First.—The assignor makes no claim nor complaint in the premises, but appears in this action seeking to uphold the assignment.

Vide his answer, (Record pp. 10 to 12), and

Second.—The assignment in question appears on its face to have been executed on September 23d, 1875, while the United States Bankrupt Law was in force, and the assignor must be presumed to have made and delivered it, with knowledge of the existence of that law, and of its effect, if any, upon that 14th Section.

Broom's Legal Maxims, 7th American from 5th London Ed., p. 267.
Opinion Ct. of Appeals Record, p. 46.
Tilton *vs.* Nelson, 27 Barb., 605.

SECOND POINT.

Even if the N. J. Statute be deemed a bankrupt or insolvent law, the United States bankrupt law did not, ipso facto, suspend its operation; it did so, only so far as the two laws came in conflict.

1st. The power given to Congress by the Constitution is "to establish uniform laws on the subject of bankruptcies "throughout the United States."

Art. 1, Sec. 8, of Constitution.

By this provision there was conferred upon Congress a power which none of the States separately had before, viz.: The power to provide for the universal discharge of bankrupts throughout the United States. There was also delegated to Congress the power to *define* who should be deemed

bankrupts, and to distribute and dispose of the estates of *such bankrupts* for the benefit of their creditors.

By the Tenth Amendment to the Constitution, it is expressly provided, that "the powers not delegated to the "United States by the Constitution, nor prohibited by it to "the States, are reserved to the States respectively or to the "people."

It is clear, therefore, that the States did not, by their creation of the power to discharge, and their delegation of the right to distribute the assets of persons defined by Congress to be bankrupts, renounce their right to make provision for the distribution of the assets, and the discharge within their own limits *of those who might not come within the Congressional definition.*

So long, then, as a State Act only operates upon the person and estate of one who does not come within the definition of a Federal Act, there is no conflict between the two, for as to this class of persons, the States did not renounce any rights.

It was early decided by the Supreme Court of the United States, that the Constitutional power vested in Congress does not impliedly prohibit the exercise of like powers by the State.

Sturges *vs.* Crowninshield, 4 *Wheat*, 122.
Ogden *vs.* Saunders, 12 *Wheat*, 213.

Only so far as Congress avails itself of the power thus created and delegated, must the States be considered to be deprived of their pre-Constitutional right.

It follows, therefore, that a State Act will come in conflict with a Federal Act *only so far as the class of persons upon which the State Act operates comes within the definition of the Federal Act;* or, to adopt the language of Congress in its first bankrupt act, the State laws will be suspended only so far as those laws affect persons within the purview of the National Act.

2 *Stats. at Large*, p. 36, Sec. 61.

This act was passed in 1800, thirteen years after the adoption of the Constitution, and this section may be supposed to

represent the views on the subject entertained by the contemporaries of the framers of the Constitution. It expressly negatives the idea of incompatibility in the co-existence of national and State systems. The insertion of this clause affords no presumption that it was deemed necessary in order to keep the State systems in activity, but should be referred rather to that same watchfulness against Congressional invasion of the reserved rights of the States which dictated the adoption of the amendments.

See the *Federalist*, p. 477, Ed. 1842.—Introductory note to the amendments.

This was the view taken by Mr. Justice Johnson in Ogden *vs.* Saunders, 12 Wheat. 275–278.

Speaking of this section of the act of 1800, he says: "The "practical construction given by that act to the Constitution "is precisely this: that it amounts only to a right to assume "the power to legislate on the subject, and therefore abro- "gates or suspends the existing laws *only so far as they may* "*clash* with the provisions of the act of Congress. This con- "struction was universally acquiesced in, for it was that on "which there had previously prevailed but one opinion from "the date of the Constitution."

In Sturges *vs.* Crowninshield, the real question for decision was as to whether the States had not prohibited themselves by implication from passing bankrupt laws, and hence as to whether all such laws in existence at the formation of the Federal Government in 1789 were not abrogated. This question was decided in the negative. Chief Justice Marshall, who delivered the opinion, in a general review of the subject, said that while States could exercise the power so long as Congress did not, the passage of a Federal act would suspend the operation of State laws; but there is no attempt at a full discussion of the subject, and what is said at page 196 must be read with and in the light of the certificate of the opinion of the Court, found at page 208: "This Court is of opinion "that since the adoption of the Constitution of the United "States, a State has authority to pass a bankrupt law, pro- "vided such law does not impair the obligation of contracts

" within the meaning of the Constitution, and provided there " be no act of Congress in force to establish a uniform system " of bankruptcy *conflicting with such law.*"

2d. This question has been many times before various Courts throughout the Union. Several Courts have held that the passage of a Federal act, *ipso facto*, suspends all State acts, but an examination of these cases will, we respectfully submit, reveal an insufficiency of argument and authority upon which to base so broad and sweeping conclusion. A leading idea seems to be that the Federal act and a State act must necessarily be incompatible; that as the distribution of insolvent estates forms a leading feature of both, the Federal act must necessarily take precedence. In other words, that during the existence of a Federal law, *no other method of distributing assets is possible than the one provided by that law*, and that an attempt to do so by any other means will be void. This view leads inevitably to the further conclusion that the common law right of voluntary assignment for the benefit of creditors, even where no preferences are made, is suspended by a Federal bankrupt law; and some of the Courts holding the first proposition have been consistent enough to hold the latter, while other Courts have upheld the continued right of common law assignments, though declaring any assignment under State insolvent laws void.

For the present it may be assumed that the right to make a voluntary assignment for the benefit of creditors is not suspended by the passage of a Federal bankrupt act.

Mayer *vs.* Hellman, above cited.
Thrasher *vs.* Bentley, 59 N. Y., 649.
Haas *vs.* O'Brien, 66 N. Y., 597.
Bostwick *vs.* Burnett, 74 N. Y., p. 317.

It follows, then, that so far as the United States Bankrupt Act deals with the distribution of assets, it does not pretend to exclusive jurisdiction in the absence of express words to that effect, and it is clear, that any distribution which does not contravene that act is valid. It can make no difference either theoretically or practically, whether such distribution is carried out by means of a State act or by direction of the debtor

in cases where the person of the debtor does not come within the definition of a national act, that is, in cases where that act does not and cannot attach.

So far, then, and only so far as the Federal act brings the debtor within its purview, will distribution under any other system be incompatible.

3d. The cases holding the opposite view and cited by counsel for plaintiff, will be found on examination to be based upon the supposed conclusions in the cases of Sturges *vs.* Crowninshield, Ogden *vs.* Saunders and *ex parte* Eames, 2 Story, 322.

The first two cases we have already referred to. In the last case the circumstances were such as to bring the State law of Massachusetts and the Bankrupt Act of 1841 in direct conflict. The petitioner first made an assignment for the benefit of creditors under the State insolvent law. Being advised that his assignment was probably void, he made a further assignment under the United States Bankrupt Act, and petitioned for an injunction to restrain his assignee under the first assignment from disposing of the property. The proceedings were entirely *ex parte*. Here evidently the debtor, by his own action, brought himself within the purview of the Federal act, and hence it would have been incompatible for the two acts to operate together; and as to the debtor, Eames, the State act was clearly suspended. The language of Mr. Justice Story is to the same effect as the expressions in the other cases cited, viz., that the State laws were suspended *so far* as the persons upon whom they acted were within the purview of the National act (p. 325).

4th. A comparison of the N. J. Statute with the U. S. Bankrupt Law of 1867 will demonstrate that the class of debtors to which the former relates is not within the terms or purview of the latter, and that there was not and could not be any conflict between the two laws.

(*A.*) The N. J. Statute applies to but one class of debtors, viz.: Those who execute voluntary assignments to trustees for the equal benefit of their creditors, *vide* title and sec 1. (Record pp. 16–17.)

(*B.*) The U. S. Bankrupt Act of 1867 applies to two classes of debtors, viz.:

(*a.*) *Voluntary bankrupts*, to wit: Persons residing within the jurisdiction of the United States owing debts provable in bankruptcy exceeding $300 who shall apply by petition, &c., the filing of such petition to be an act of bankruptcy, and the petitioner to be adjudged a bankrupt.

U. S. R. S., sec. 5014, p. 967.

(*b.*) *Involuntary bankrupts*, to wit: "Any person residing "and owing debts as aforesaid, who, after the passage of this "act, * * * * * * shall make any assignment, gift, sale, "conveyance or transfer of his estate, property, &c., either "within the United States or elsewhere, *with intent to delay, "defraud, or hinder his creditors* * * * * * or who, "being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, "sale, &c. * * * *with intent to give a preference to one "or more of his creditors* * * * * * with the intent, "by such disposition of his property, to defeat or delay the "operation of this act * * * * * * shall be deemed to "have committed an act of bankruptcy * * * * * * and "shall be adjudged a bankrupt on the petition of one or more "of his creditors * * * provided such petition is brought "within six months after such act of bankruptcy," &c.

U. S. R. S., sec. 5021, p. 968.

The two classes of persons who are within the purview of the Federal Act are thus clearly defined, and it is apparent that persons who voluntarily assign their estates to trustees for the equal benefit of their creditors are not within its terms. It cannot be said that a person who assigns pursuant to the N. J. Statute is within the terms of sec. 5014; that section does not provide that a person owing over $300 *shall* file a petition, nor that he *shall not* make any other distribution of his property; it says, *if he shall*, hence, under sec. 5014, a debtor can only bring himself within the purview of the Federal Act by filing his petition, praying to be adjudged a bankrupt.

Nor can it be claimed that an assignor assigning pursuant to the N. J. Statute is within the purview of section 5021 of the Federal Act.

One of three intents on the part of the debtor is necessary to bring him within the terms of that section; 1, where the assignment is made with intent to *delay, defraud or hinder creditors*, the N. J. Statute provides that in case of an assignment the property shall be promptly divided, and under its provisions creditors cannot be delayed, defrauded, nor hindered, and it is expressly found (Record, p. 28, fol. 57), with reference to the assignment in question, that "said assignment was executed and delivered by the defendant Locke, "and accepted by the other defendants in good faith, and "without any intent to hinder, delay, or defraud the creditors of said Locke, or any of them, and with the intent, "*bona fide*, to make an equal distribution of the proceeds of "the assigned estate among the creditors of said Locke in "conformity to the requirements of the Act of the Legislature above mentioned;" 2, where the assignment is made *with intent to give a preference to one or more creditors.*

This is distinctly forbidden by the N. J. Act, which declares such preferences void, and the assignment in this case expressly provides for an equal division of the assigned estate among the creditors; 3, where the assignment is made *with intent to defeat or delay the operation of the Federal Act.* It is not alleged, nor found as a fact, that the assignment was made with any such intent. It is not claimed, nor found, that, at the time of the assignment, the assignor Locke was within the purview of the Bankrupt Act, nor is it alleged nor found that, as to him, any of the conditions specified in section 5021 existed, and it is expressly found (Record, p. 29) *that no proceedings in bankruptcy have ever been taken against him.*

It follows then, that, as the Bankrppt Law of 1867 does not apply to the class of debtors referred to in the N. J. Statute, the latter is not affected by the former.

THIRD POINT.

The statute in question, even if it be treated as an insolvent or bankrupt law, is not superseded nor suspended by the United States Bankrupt Act until the two laws come into practical conflict; that is, until proceedings in bankruptcy have been taken, within the time limited by law, against the insolvent, when the United States law must, of course, prevail.

This subject has been very fully and carefully discussed by the Supreme Court of Errors of the State of Connecticut, in the case of "Geery's Appeal from Probate," 43 *Conn.* 289.

In that case a creditor of the Guinness Sewing Machine Company attached its property to secure his claim. Another creditor thereupon instituted proceedings, under the insolvent law of that State, for the purpose of compelling an equal distribution of the property of the corporation among its creditors.

The Court of Probate granted the application, and appointed a trustee, and the attaching creditor appealed to the Superior Court, claiming that the bankruptcy law of the United States suspended the operation of the State insolvent law.

It appeared that the Guinness Company was unable to pay its debts; that those debts exceeded the sum of $300; that it was in a condition to apply voluntarily for the benefit of the Bankrupt Act, but it had committed no act of bankruptcy, and was not subject to compulsory proceedings.

The Court affirmed the action of the Court of Probate, holding that in respect to all persons and matters over which the Bankrupt Act did not *take* jurisdiction, the insolvent law of Connecticut remained in full force.

See, also, *ex parte* Ziegenfuss, 24 *N. C.* 463.
Reed *vs.* Taylor, 32 *Iowa*, 207.
Maltbie *vs.* Hotchkiss, 38 *Conn.* 80.

FOURTH POINT.

Even if the assignment were in violation of the provisions of the U. S. Bankrupt Act, it could only be attacked by an assignee in bankruptcy within six months after its execution.

Bostwick *vs.* Burnett, 74 N. Y., 317.
Dodge *vs.* Sheldon, 6 Hill, p. 1.
Seaman *vs.* Stoughton, 3 Barb. Chy., 344.
Opinion, pp. 348, 9.
Williams *vs.* Pitts, 55 How Pr., 331.
Geery's Appeal, 43 Conn , 289.
Maltby *vs.* Hotchkiss, 38 Conn., 80.
Reed *vs.* Taylor, 32 Iowa, 209.
Craqui *vs.* Thompson, U. S. Circuit, Iowa, 12 Nat. Bank Reg., 81.

It is expressly found (Record, p.) that no proceedings in bankruptcy have ever been taken against the assignor Locke.

FIFTH POINT.

The assignment at bar is valid as a voluntary common law assignment for the equal benefit of the assignor's creditors.

The rule may now be considered firmly established, that a voluntary assignment for the benefit of creditors without preferences is not affected by the U. S. Bankrupt law, and is valid even against an assignee in bankruptcy, if executed six months prior to the commencement of bankruptcy proceedings. It is equally clear that State Statutes which prescribe the terms and mode of administration of such assignments are not bankrupt nor insolvent law.

Mayer *vs.* Hellman, 91 U. S., 496.
Thrasher *vs.* Bentley, 59 N. Y., 649; more fully reported in 1 Abb. New Cases, 39.
In re Hawkins, 34 Conn. 548.
Shepardson's Appeal, 36 Conn. 23.
Maltby *vs.* Hotchkiss, 38 Conn. 80.
Beck *vs.* Parker, 65 Penn. 262.
Von Hein *vs.* Elkus, 15 B. R. 195.

Cook *vs.* Rodgers, 31 Mich. 391.
Reed *vs.* Taylor, 32 Iowa, 209.
Sedgwick *vs.* Place, 1 B. R. 204.
Langley *vs.* Perry, 2 B. R. 596, (810)

Even though a voluntary assignment be executed within six months of the commencement of bankruptcy proceedings it has been held that it is valid as against an assignee in bankruptcy when it does not contain preferences.

Haas *vs.* O'Bryan, 66 N. Y. 597.

A perusal of the assignment at bar will demonstrate that it is simply a voluntary assignment for the benefit of creditors, and not a statutory transfer in proceedings in *invitum* under the Insolvent Act of New Jersey, nor is it, in any sense, the creature of that act; it is so drawn as to conform to the requirements of the New Jersey Statute above referred to, and that "is a statute not of creation but of direction; it recognizes the existence of the power in the citizen to make an assignment of his property to trustees for the benefit of his creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse."

Thrasher *vs.* Bentley, 59 N. Y. 649.

The trust contained in the assignment is as follows: "In trust to take possession, &c., and to sell, &c., and to distribute the proceeds to and among the creditors of the said William H. Locke, in proportion to their several just demands, pursuant to the statute in such case made and provided." This is a declaration that the assignment is made in conformity to the New Jersey Statute, which requires that every assignment shall be for the equal benefit of the creditors of the assignor, in proportion to their several demands, and is, in substance, a direction to the assignee, so to divide the assigned estate among the creditors.

Now, whether the New Jersey Statute be, or be not, suspended, is immaterial for the assignor's right to execute an assignment of his property in trust for the equal benefit of all his creditors existed and exists independently of that statute, and was not affected by the bankrupt law, and all that the

assignor in this case has done is, to execute an assignment of that description. The reference in the assignment to the statute, if the latter were suspended, is mere surplussage; the trust is complete, and clearly expressed whether that reference be contained in the assignment or not.

In concluding this point, we beg the attention of the Court to the fact, that plaintiff's case depends entirely upon the effect to be given to the words, "pursuant to the statute in "such case made and provided."

It is apparent, therefore, upon what a narrow foundation it rests; how entirely technical it is, and how utterly destitute of any element of equity. Here are two laws, one Federal and the other State, both positively prohibiting preferences to creditors, and here is a judgment creditor who, out of a pretended conflict between these two laws, seeks, *through the medium of a Court of Equity*, to obtain the very preference which is forbidden by both.

As was said by the Court in Maltby *vs.* Hotchkiss, *supra:* "It would be strange, indeed, if these two laws, each intend-"ing and providing that a debtor's property shall be equally "divided among his creditors, should be so interpreted in "any case as to defeat that object, and work a practical "preference."

What the plaintiff is here seeking to obtain for his judgment creditors is not an equal distribution of the assets of the assigned estate among the creditors, but a preference, a payment in full, which is forbidden by the U. S. Bankrupt Act, by the Statute of New Jersey, and by the terms of the assignment in question.

In conclusion, we submit that the judgment appealed from should be, in all things, affirmed with costs.

MARTIN & SMITH,

Attorneys for defendants in error.

A. P. WHITEHEAD, and
M. W. DIVINE,

Of counsel.